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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 133
MISCELLANEOUS

EARL R. DEEN,

Petitioner,

v.

HON. J. E. HICKMAN, Chief Justice, and
HON. W. ST. JOHN GARWOOD, *et al.*, Associate Justices of
The Supreme Court of Texas,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

and

PETITION FOR WRIT OF MANDAMUS

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and

PETITION FOR WRIT OF MANDAMUS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner, Earl R. Deen, and moves the Court for leave to file the Petition for a Writ of Mandamus hereto annexed, or, in the alternative, moves the Court for Writ of Certiorari on separate petition filed contemporaneously herewith.

Petitioner further moves the Court that an order and rule be entered and issued, directing the Honorable J. E. Hickman, Chief Justice and the Honorable W. St. John Garwood, Meade F. Griffin, Robert W. Calvert, Clyde E. Smith, Frank P. Culver, Jr., Ruel C. Walker, James R. Norvell and Joe R. Greenhill, Associate Justices of The Supreme Court of Texas, in their capacities as Chief Justice and Associate Justices of The Supreme Court of Texas, to show cause why a Writ of Mandamus should not issue against them in accordance with prayer of said petition, and why your petitioner should not have such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

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s ROBERT LEE GUTHRIE

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July 11, 1958.

In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 133

MISCELLANEOUS

EARL R. DEEN,

Petitioner,

v.

HON. J. E. HICKMAN, Chief Justice, and HON. W. ST. JOHN GARWOOD, *et al.*, Associate Justices of The Supreme Court of Texas,

Respondents.

PETITION FOR WRIT OF MANDAMUS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now petitioner, Earl R. Deen, of Brown County, Texas, and respectfully shows that the Honorable J. E. Hickman is the duly elected, qualified and acting Chief Justice of The Supreme Court of Texas, is a citizen of Texas, and has an official residence in Austin, Travis County, Texas; and that the Honorable W. St. John Garwood, Meade F. Griffin, Robert W. Calvert, Clyde E. Smith, Frank P. Culver, Jr., Ruel C. Walker, James R. Norvell and Joe R. Greenhill are the duly elected, qualified

and acting Associate Justices of The Supreme Court of Texas, are citizens of Texas and have their official residences in Austin, Travis County, Texas, and all of the respondents were such officials and so acting at all times referred to herein. The purpose of this petition is to obtain from this Honorable Court under the authority of section 1651 (a) of the *Judicial Code* [*28 U. S. C. A. sec. 1651 (a), June 25, 1948, c. 646, 62 stat. 944, amended May 24, 1949, c. 139, sec. 90, 63 stat. 102*], a writ of mandamus to compel compliance with and prevent an invasion and annulment of the judgment and opinion of this Honorable Court entered on April 8, 1957, and on which a mandate was issued on May 10, 1957 in No. 199, October Term, 1956, entitled *Earl R. Deen v. Gulf, Colorado and Santa Fe Railway Company* and filed in the Court of Civil Appeals of Texas at Eastland on May 13, 1957. The opinion of this Honorable Court is reported in *353 U. S. 925, 77 S. Ct. 715.*

I. STATEMENT OF THE MATTER INVOLVED

As appears from the record in said cause now on file with this Honorable Court, petitioner obtained a jury verdict and judgment on April 12, 1954 in the District Court of Brown County, Texas, against Gulf, Colorado and Santa Fe Railway Company under the Federal Employers Liability Act for $21,450.00, with interest and costs (R. 157). Such judgment on appeal to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas was reversed and the Court decreed that Deen recover nothing *(275 S. W. 2d 529)*. The Supreme Court of Texas re-

fused Writ of Error and this Honorable Court granted a Writ of Certiorari to the Court of Civil Appeals of Texas to review said judgment and the cause was argued before this Honorable Court on April 1, 1957. Thereupon, this Honorable Court reversed the judgment of the Court of Civil Appeals of Texas, taxed the costs in the Supreme Court of the United States against Gulf, Colorado and Santa Fe Railway Company, and remanded the cause for execution and proceedings "in conformity with the judgment and decree of this Court * * *."

In its opinion and in the mandate issued to the Court of Civil Appeals of Texas this Honorable Court said:

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury."

After remand the Court of Civil Appeals refused to consider the contention of the railway company that petitioner's evidence was insufficient to support the jury's conclusion of employer negligence holding it was precluded from considering this point by the judgment and the mandate of the Supreme Court of the United States. (Opinion of the Court enclosed with record—*306 S. W. 2d 171.*) The Court of Civil Appeals then considered the other points presented, but not acted on by the Court on the former appeal, and not decided by the Supreme Court of the United States. The Court of Civil Appeals found that none of these other points presented reversible error, with the exception the Court found the damages, as found by the jury and the trial court, were excessive in the amount of

$5,500.00, and ordered Deen to file a remittitur for the amount or else the cause would be reversed to the trial court for further proceedings. (Opinion of the Court of Civil Appeals in Record accompanying this Petition.) Deen filed a remittitur on October 6, 1957, but reserved the right in case of further appeal to question the correctness of the Court of Civil Appeals' ruling that the verdict of the jury and the judgment of the trial court were excessive (Deen's Motion for Rehearing in the Court of Civil Appeals in new Record accompanying this Motion). The Court of Civil Appeals of Texas then reformed the judgment of the trial court and rendered judgment in favor of Deen. The railway company filed an application for writ of error to The Supreme Court of Texas and thereafter Deen filed an Application for Writ of Error. (Applications in new Record.) The Supreme Court of Texas granted the railway company's application on the ground that the mandate of the Supreme Court of the United States did not preclude the Court of Civil Appeals from inquiring into the sufficiency of the evidence to support the jury's verdict of employer negligence and granted Deen's application, complaining that the action of the Court of Civil Appeals, in declaring the jury verdict excessive and requiring a remittitur, had deprived him of the right of trial by jury given him by the FELA. After a hearing, The Supreme Court of Texas affirmed all of the rulings of the Court of Civil Appeals (including the one requiring a remittitur of $5,500.00) except The Supreme Court of Texas reversed the Court of Civil Appeals on the point that the mandate

of the Supreme Court of the United States precluded it from inquiring into the sufficiency of the evidence to support the jury's conclusion of employer negligence and remanded the case to the Court of Civil Appeals directing it to inquire into the sufficiency of the evidence to support the jury's conclusion of employer negligence on its independent evaluation of the evidence and wholly apart from the judgment of the Supreme Court of the United States. (Opinion of The Supreme Court of Texas is attached hereto.)

The Supreme Court of Texas violated the mandate of the Supreme Court of the United States in granting the railway company's writ of error on the point that the Court of Civil Appeals should inquire into the sufficiency of the evidence to support the jury's conclusion of employer negligence and thereafter in reversing and remanding the cause of the Court of Civil Appeals solely on the question that the Court of Civil Appeals should evaluate the sufficiency of the evidence to support the jury's finding of employer negligence wholly apart from the judgment of the Supreme Court of the United States.

The Supreme Court of Texas further disregarded the mandate of the Supreme Court of the United States by failing to issue execution for costs incurred by Deen in the Supreme Court of the United States, though that Court awarded him judgment therefor, and though such execution was twice requested in The Supreme Court of Texas. (Demand for Execution in the New Record and Deen's Appli-

cation for Writ of Error, p. 15.) On May 10, 1958, Deen filed Motion for Rehearing in The Supreme Court of Texas and the same was overruled on May 28, 1958. (See certified copy of Order of the Record.) Deen thereafter filed Motion to Recall Mandate and Record forwarded to the Court of Civil Appeals and to Stay Mandate Pending Application for Certiorari and the same was granted by The Supreme Court of Texas June 4, 1958. (Certified copy of Order in the Record.)

Petitioner has timely asked the Court of Civil Appeals of Texas and The Supreme Court of Texas to give effect to the mandate of the Supreme Court of the United States and has timely filed this petition.

No further relief can be obtained by petitioner in the Courts of the State of Texas. The Supreme Court of Texas is the highest court in said State in which decisions can be had in this cause. That Court has held that the action of the Court of Civil Appeals in taking away a substantial part of the damages, awarded Deen by the jury and the trial court on substantial evidence, did not deprive Deen of the right of trial by jury given him by the Congress under the FELA since the action of the Court of Civil Appeals of Texas was in accord with local practice. The Supreme Court of Texas has finally adjudged that the Court of Civil Appeals must inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury in spite of the holding of the Supreme Court of the United States that

the proofs justify with reason the jury's conclusion that employer negligence played a part in producing Deen's injury and in spite of the fact that the Court of Civil Appeals of Texas was so instructed in the mandate of the Supreme Court of the United States. In its mandate to the Court of Civil Appeals, The Supreme Court of Texas practically instructs the Court of Civil Appeals to find the evidence insufficient to support the jury's conclusion of employer negligence by stating that where the Court of Civil Appeals has found no evidence to support the jury verdict it would ordinarily assume the Court would now hold that the verdict is against the great weight and preponderance of the evidence (Opinion, p. 30). The Court of Civil Appeals of Texas acted promptly in making this finding and did so on May 16, 1958, and remanded the cause to the trial court for a new trial without awaiting the mandate of The Supreme Court of Texas and while Deen's Motion for Rehearing was still pending in The Supreme Court of Texas (Opinion of Court of Civil Appeals, May 16, 1958). The Court on its own Motion set aside its precipitate action four days later, on May 20, 1958. (Certified copy of the Order of the Court of Civil Appeals.) The only adequate remedy which petitioner has by which to enforce compliance with the judgment, opinion and mandate of this Honorable Court and to prevent the evasion and annulment thereof is by this Petition for Writ of Mandamus, or, in the alternative, by the Petition for Writ of Certiorari, contemporaneously filed herewith.

II. JURISDICTION

1. Jurisdiction to grant this petition is sustained by *Title 28 U. S. C. A. sec. 1651, sub-sec. a* (June 25, 1948 c. 646, 62 stat. 944 amended May 24, 1949 C. 139 sec. 90, 63 stat. 192).

III. QUESTION PRESENTED

Whether The Supreme Court of Texas has violated the mandate of the Supreme Court of the United States in directing the Court of Civil Appeals of Texas to inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury when the Court of Civil Appeals was informed by the mandate of the Supreme Court of the United States that, "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury," and the Supreme Court of the United States directed the Court of Civil Appeals to proceed "in conformity with the judgment and decree of this Court above stated * * *."

IV. REASON RELIED ON FOR ALLOWANCE OF THE WRIT OF MANDAMUS

The sufficiency of the evidence to support the jury's conclusion of employer negligence was decided by the Supreme Court of the United States. After remand, as the Court of Civil Appeals of Texas, so decided, this matter was no longer left open for the determination of the Texas appellate courts. All other questions left open upon remand

of this cause by the Supreme Court of the United States have now been finally adjudicated by the Texas courts. While Deen has never conceded that the Texas appellate courts, under federal procedure applicable to FELA, had authority to require a remittitur of $5,500.00 on threat of reversing and remanding the case to the trial court for further proceedings, nevertheless, if the Court of Civil Appeals of Texas did have that authority, as The Supreme Court of Texas found, and if the remittitur should be applied to the judgment of $21,450.00, as The Supreme Court said, then in compliance with the opinion of the Supreme Court of the United States, and the opinion of The Supreme Court of Texas, nothing remained for The Supreme Court of Texas except the ministerial duty of rendering judgment in favor of Deen for $15,950.00, with interest and costs. Deen says the requiring of the remittitur was not in accordance with federal procedure and deprived him of the right of trial by jury but says The Supreme Court of Texas and the Court of Civil Appeals were not precluded by the mandate of the Supreme Court of the United States from considering this question and The Supreme Court of Texas having decided that the remittitur was proper owed a ministerial duty to render a judgment in accordance therewith, all other questions having been finally adjudicated, leaving to Deen his remedy to petition the Supreme Court of the United States by certiorari to set the remittitur aside. The Supreme Court of the United States has the authority and the duty to issue a Writ of Mandamus to the Justices of The Supreme Court of Texas to compel

them to perform a ministerial duty of rendering judgment in conformity to the mandate of the Supreme Court of the United States, where all questions, not embraced in the Mandate, have been finally adjudicated in The Supreme Court of Texas.

V. ARGUMENT AMPLIFYING REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

In filing this Petition for Writ of Mandamus in the alternative, petitioner is requesting this Honorable Court to issue such Writ in the event that it does not issue its Writ of Certiorari as requested in a petition filed contemporaneously herewith. Dean asks this Honorable Court to consider the authorities and argument presented in the petition for certiorari filed herewith just as if such petition were fully copied herein. Petitioner has preserved the question, throughout the proceedings in the state courts after remand, whether the Texas appellate courts have a second time deprived him of the right of trial by jury by substituting their finding for that of the jury and the trial court on damages. Petitioner believes this question, not passed on by the Texas appellate courts in the previous appeal, and not passed on by the Supreme Court of the United States, was left open for adjudication by the mandate of the Supreme Court of the United States. However, this question has been decided in a manner conflicting with the decisions of the Supreme Court of the United States and the petitioner by certiorari is seeking to have this Court finally decide that question. If the decision of The

Supreme Court of Texas is a final judgment in that it finally adjudicates all issues between the parties, undisposed of by the Supreme Court of the United States, irrespective of the fact that in form it is not final, then a Writ of Certiorari appears to be the appropriate remedy. This Court has held that a decision of the highest state court that adjudicates all the issues between the parties is a final judgment despite the form in which it is worded.

Department of Banking v. Pink, 317 U. S. 264, 63 S. Ct. 233, 87 L. Ed. 257;

Market Street R. Co. v. R. R. Commission of Calif., 324 U. S. 548, 65 S. Ct. 770, 89 L. Ed. 1171;

Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 67 S. Ct. 156;

Cole v. Violette, 319 U. S. 581, 63 S. Ct. 1204;

Pope v. Atlantic Coast Line R. Co., 345 U. S. 379, 73 S. Ct. 749.

It appears that the Supreme Court of the United States should look upon The Supreme Court of Texas as having done that which it ought to have done in the performance of its ministerial duty and therefore consider the judgment final.

Furthermore, even apart from the finality of the Texas judgment, it appears that this Honorable Court has the jurisdiction and the power to give effect to its own judgment and compel compliance therewith by writ of certiorari or mandamus when the court below has reached the point

that no further proceedings may be had without violating the mandate of this Court. *B. & O. RR. Co. v. United States*, 279 U. S. 781, 49 S. Ct. 492, 493.

However, if this Court should hold that it does not have jurisdiction to entertain a Petition for Writ of Certiorari, then the only adequate remedy petitioner has is a writ of mandamus issued by this Court to The Supreme Court of Texas. It would be futile for petitioner to seek any further relief in the Court of Civil Appeals of Texas. That Court has already said that it still considers the jury's finding of negligence was against the overwhelming weight and preponderance of the evidence. (Second Opinion of the Court of Civil Appeals: Third Opinion of Court of Civil Appeals reversing case to trial court without awaiting Mandate of the Supreme Court of Texas.) The Supreme Court of Texas in its mandate to the Court of Civil Appeals tells the Court that where a Court of Civil Appeals holds there is no evidence to support a jury verdict it ordinarily assumes that the Court will also hold the verdict is against the great weight and preponderance of the evidence. (Opinion of The Supreme Court of Texas.) If The Supreme Court of Texas is correct, all that the judgment of this Honorable Court established in the Deen case was Deen's right to require the Texas appellate courts to say: "The verdict is against the overwhelming weight and preponderance of the evidence," rather than, "There is no evidence to support the verdict" in taking the jury verdict away from him.

If Deen submitted to a new trial, it would be the duty of the trial court to take any verdict away from him under the decision of The Supreme Court of Texas, unless new evidence was introduced, and three decisions of the Court of Civil Appeals of Texas, one of The Supreme Court of Texas, and one of this Court, would have settled nothing of substance.

If this Honorable Court should hold that a writ of mandamus is the only appropriate remedy for petitioner at this time, then petitioner reserves the right to ask the Court to review the question at a later time, whether the Texas appellate courts have deprived him of the right of trial by jury by substituting their findings for that of the jury and the trial court on damages.

This Honorable Court has heretofore permitted the filing of a Petition for a Writ of Mandamus against a state court. In the case of *Ex Parte Texas, 315 U. S. 8, 86 L. Ed. 579, 62 S. Ct. 418*, this Court issued its order to show cause why The Supreme Court of Texas should not proceed consistent with the prior decision of this Court. Unlike the instant case the judgment and decree of this Honorable Court provided for further hearings on the issues of the case consistent with the rules laid down in the opinion of this Court concerning the admissibility of evidence. Those issues, after remand, had not yet been determined in the state courts. The mandate in the *Deen* case did not

permit The Texas Supreme Court to direct lower courts to inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing Deen's injury, and the issues left open by the mandate of this Court have now been finally determined after remand. The authority of the Supreme Court of the United States to compel a state court to comply with its mandate has been stated by this Court in *Martin v. Hunter's Lessee*, 1 Wheaton 304, 4 L. Ed. 97.

If writs of certiorari can be prevented by state court's reversing and remanding causes for further proceedings irrespective of the mandate of the Supreme Court of the United States, and if this Honorable Court refuses to compel state courts to comply with its mandates by appropriate writs, then the decision of the Supreme Court of the United States in cases originating in state courts will be enforceable only to the extent the state courts are willing to enforce them. As this Court pointed out in the case of *Maguire v. Tyler*, 17 Wall (84 U. S.) 253, 21 L. Ed. 576, the refusal of a state court to proceed as directed by this Court would "operate as a repeal of the Constitution and the Laws of Congress passed to carry the judicial powers conferred by the Constitution into effect." If the proceedings in The Supreme Court of Texas are not corrected to conform to the judgment, opinion and mandate of this Court, then judges of state courts hereafter need not be

concerned with that part of Article 6 of the Constitution of the United States which provides that "This Constitution, and the Laws of the United States which shall be made in pursuance thereof * * * shall be the Supreme Law of the Land; and the judges in every state shall be bound thereby."

VI. CONCLUSION

The decisions of this Honorable Court in FELA cases have not received a friendly reception in the Texas appellate courts. Deen's Original Application for Writ of Error was refused by The Supreme Court of Texas two years ago on June 29, 1955 (R. 230). In *Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, 225,* The Supreme Court of Texas told why it was refusing Application for Writ of Error in the *Deen* case. It brushed aside the great humanitarian decisions of this Honorable Court with the remark:

> "The decisions of the Supreme Court which are cited by the parties represent only that court's appraisal of the facts there involved, and are of little assistance in the determination of cases which are not factually analogous."

This statement clearly evidences an intent on the part of The Supreme Court of Texas to disregard the decisions of the Supreme Court of the United States by fine factual distinctions. When the appellate courts of Texas received

the mandate of this Honorable Court in the *Deen* case they have sought to evade it and render it ineffective. Neither the Court of Civil Appeals nor The Supreme Court have issued execution for costs adjudged to Deen by this Honorable Court though execution has been twice requested from each court.

In granting Writ of Error on the point that the Court of Civil Appeals should inquire into the sufficiency of the evidence to support the jury's conclusion of employer's negligence, independent of the mandate of the Supreme Court of the United States, and reversing and remanding the case to the Court of Civil Appeals with directions to go into this question The Supreme Court of Texas has twice violated the mandate of this Court.

WHEREFORE, petitioner respectfully submits in the alternative, and in the event this Honorable Court does not grant Petitioner's Petition for Writ of Certiorari filed contemporaneously herewith, that this Honorable Court issue its Writ of Mandamus to the members, hereinabove set out, of The Supreme Court of Texas, requiring The Supreme Court of Texas to vacate its judgment rendered on May 7, 1958 in this cause and requiring the said The Supreme Court of Texas to render a judgment and decree sustaining and affirming the judgment of the trial court rendered April 12, 1954 subject to a remittitur in the sum of $5,500.00, but without prejudice to Deen's right to seek review of such remittitur by this Court by Petition for

Writ of Certiorari and petitioner prays for such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

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Of Counsel:

s/ ROBERT LEE GUTHRIE

ROBERT LEE GUTHRIE,
1608 Mercantile Bank Building,
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July 11, 1958.

THE STATE OF TEXAS)
COUNTY OF DALLAS)

Earl R. Dean, petitioner herein, states he has read the above and foregoing petition for writ of certiorari and that the statements therein contained are true and correct according to the best of his knowledge, information and belief.

s EARL R. DEEN

EARL R. DEEN

SUBSCRIBED AND SWORN TO, before me, at Dallas, Texas, this 11th day of July, 1958.

s LOIS BALLARD

Notary Public, Dallas County, Texas.

My Commission expires June 1, 1959.

CERTIFICATE OF SERVICE

I certify that a copy of Motion for Leave to File Petition for Writ of Mandamus and copy of this Petition for Writ of Mandamus have been mailed on the 11th day of July, 1958, to Honorable J. E. Hickman, the Chief Justice, and Honorable W. St. John Garwood, Meade F. Griffin, Robert W. Calvert, Clyde E. Smith, Frank P. Culver, Jr., Ruel C. Walker, James R. Norvell and Joe R. Greenhill, the Associate Justices of The Supreme Court of Texas c o The Supreme Court of Texas, Capitol Building, Austin, Texas; and also to Messrs. Wigley, McLeod, Mills and Shirley, Attorneys at Law, Union Station Building, Galveston, Texas; to Messrs. Woodruff and Holloway, Attorneys at Law, First National Bank Building, Brownwood, Texas; and to Messrs. Hudson, Keltner and Sarsgard, Attorneys at Law, 1313 Continental Life Building, Fort Worth 2, Texas, attorneys for Gulf, Colorado and Santa Fe Railway Company.

s ROBERT LEE GUTHRIE

ROBERT LEE GUTHRIE

APPENDIX

In the

SUPREME COURT OF TEXAS

No. A-6584

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
Petitioner,

v.

EARL R. DEEN,
Respondent.

From Brown County, Eleventh District

The judgment here under review is one by the Court of Civil Appeals (306 S. W. 2d 171) affirming, upon condition of remittitur of $5500, a $21,450 judgment of the trial court in favor of the plaintiff Deen in his action for personal injuries against the defendant Gulf, Colorado and Santa Fe Railway Company under the Federal Employers' Liability Act, the affirmance being consequent upon reversal by the Supreme Court of the United States of the prior judgment of the Court of Civil Appeals in the same case, in which the latter court had held the verdict to be without support in the evidence.[1]

[1] Deen v. Gulf, Colorado and Santa Fe Railway Co., 353 U. S. 925, reversing Gulf, Colorado and Santa Fe Railway Co. v. Deen, 275 S. W. 2d 529, Tex. Civ App.

The principal questions are narrow ones involving the impact of the Supreme Court judgment of reversal upon the factual jurisdiction of our courts of Civil Appeals. The factual powers in question are: (a) that of reversing and remanding for a new trial, when the court believes the verdict or the fact findings of the trial judge to be so against the great weight and preponderance of the evidence as to be manifestly wrong, notwithstanding they may be supported by some evidence of substantial character[2]; (b) that of requiring, as a condition of affirmance and alternative to reversal and remand for a new trial, a remittitur of such portion of the damages as the court considers excessive.

Both the plaintiff employee and defendant employer being now petitioners in this court, they will be sometimes referred to herein by their respective trial court designations.

Deen's recovery in the trial court was by reason of a broken leg suffered in the course of his regular employment in the shops of the defendant as the result of an effort on the part of himself and an assisting fellow servant to dump a 550-pound piece of babbitt metal from an old melting pot preparatory to putting it into a new pot. The old pot, which was more or less the same size and shape of

[2] See "The Question of Insufficient Evidence on Appeal," 30 Tex. L. Rev. 803; King v. King, 150 Tex. 662, 244 S. W. 2d 660; Hopson v. Gulf Oil Corp., 150 Tex. 1, 237 S. W. 2d 352; also Ex Parte Texas, 315 U. S. 8, 13; Barker v. Coastal Builders, 153 Tex. 540, 271 S. W. 2d 798; Bowman v. Puckett, 144 Tex. 125, 188 S. W. 2d 571.

Rule 440, Tex. R. Civ. Proc.; Texas Pipe Line Co. v. Hunt, 149 Tex. 33, 39-40, 228 S. W. 2d 151, 155; Carter v. Texarkana Bus Co., Tex. , 296 S. W. 2d 753.

an ordinary kitchen sink and itself weighed some 250 pounds, was sitting on the floor, and the two employees sought to dump the metal content by lifting with their own hands the far edge of the pot more or less in their own direction, with the result that, when the metal fell out, it struck the plaintiff's leg.

There was a proper lifting crane or apparatus at hand which the plaintiff knew how to operate by himself, but which had, according to his evidence, no proper clamps or other implements whereby to affix the lifting chains to the edge of the pot for effective handling of this particular operation. The plaintiff, while a mere servant, was the one responsible for the particular work, understood it well, and had actually done it several times before by hand with the aid of three or four fellow servants, although the lifting in the latter instances was evidently done by raising the side of the pot nearest the lifters and thus dumping the contents away from them. In the present instance, the plaintiff, although not directed, or in any fashion required, to do the dumping operation himself, was attempting to do so, when his fellow servant voluntarily proceeded to help him. While it does not appear that additional assistants had been actually delegated by the foreman, or were standing nearby awaiting a chance to help, the evidence showed clearly that the plaintiff could have got all the needed assistance by asking for it, as, indeed, he had done in prior instances without difficulty.

Notwithstanding the foregoing, the plaintiff's suit was based expressly, perhaps necessarily, upon the combined propositions that he was not supplied with proper tools and that sufficient assistance was not properly afforded him to do the lifting by hand, as well as upon the further proposition that the defendant failed to give him proper supervision.

The jury found (a) that the accident proximately resulted from negligence of the defendant in failing to supply proper tools and that the plaintiff's total damages were $39,000; but it also found (b) that the defendant did *not* fail to give the plaintiff proper supervision, and (c) that the plaintiff himself was negligent in failing to obtain additional help and thus contribute to his own injury to the extent of 45 per cent. The trial court rendered judgment accordingly for the plaintiff in the net sum of $21,450.

The defendant thereupon appealed to the Court of Civil Appeals, presenting there, in due form and based on a proper record in the trial court, three alleged errors (along with others hereinafter discussed) to wit, (1) that the above-mentioned sole finding of negligence on the part of the defendant was unsupported by evidence, and that accordingly the appellate court should reverse and render judgment that the plaintiff take nothing, as the trial court should have done; (2) that (alternatively) the same finding was so against the great weight and preponderance of the evidence as to be manifestly unjust, and that

the appellate court should accordingly reverse and grant a new trial, as the trial court should have done; and (3) that the gross damages found ($39,000) were excessive. As before indicated, the Court of Civil Appeals, by its opinion reported in 275 S. W. 2d 529, sustained assignment (1) rendered judgment accordingly that the plaintiff take nothing, but did not in that opinion expressly rule or comment upon point (2) or the other remaining points.

The points in question, as indicated by the citations in footnotes 2 and 3, supra, respectively correspond to definitely separate, familiar and long-established institutions of Texas practice. Our practice recognizes important differences between (1) and (2). The former we have always considered as presenting a question of law and the latter one of fact. The problem in the former is merely to ascertain if there is any evidence of more than a *scintilla* to support the verdict. In the latter it is the quite different problem of balancing substantial evidence that supports the verdict against substantial evidence that is against the verdict and thus determining, for the sole purpose of ordering or not ordering a new trial, whether the great weight and preponderance of the evidence is against the verdict.

While the instant case concerns only the powers of our appellate courts, the two points, with their differences, also occur in the trial court. For example, the trial judge may refuse to submit a requested jury issue when he considers that the answer sought would be without support in the evidence and may accordingly instruct a verdict

and render judgment for the opposite party, or, having let the issue go to the jury, may later render judgment *non obstante veredicto* on the same ground. On the other hand, the judge can do none of these things where the issue or verdict has some support in the evidence, although the great weight and preponderance of the evidence may be the other way. In the latter situation he may grant a new trial, but, by reason of our constitutional guarantee of trial by jury, this is all he may do, and, under Rule 326 of our Rules of Civil Procedure, he may do it not more than twice in the same litigation.

On appeal, our Courts of Civil Appeals exercise the same powers as the trial judge in the matter of upholding or setting aside a verdict or verdicts by reason of evidence or deficiency therein. If the appellant raises only the law point of "No evidence", they affirm the judgment for the appellee when they consider the verdict to be supported by more than a *scintilla*, and, when they consider it not so supported they ordinarily reverse and render final judgment in the appellant's favor. If the appellant raises only the point that the verdict is against the great weight and preponderance of the evidence, the court, of course, affirms the trial court judgment when it considers the point to be without merit; but, when the point is considered well taken, the court merely remands for a new trial, and cannot make its own findings or render final judgment for the appellant in accordance with the greater weight and preponderance of the evidence. The action of the appellate court in such a situation is thus no more nor less than that of

the trial court when the latter grants or refuses a new trial on the same point. The particular appellate power derives directly from Art. V, Sec. 6, of the State Constitution. See the citations in footnote 2.

Often both points are raised on appeal. In that event the Court of Civil Appeals will ordinarily act first upon the point of "no evidence". If it considers the latter well taken, it will reverse and, ordinarily, render final judgment for the appellant, disregarding the point of weight and preponderance. But if it regards the point of "no evidence" as not well taken, that is, if it finds the verdict to be supported by more than a *scintilla* of evidence, it must then consider the point of weight and preponderance, affirming the trial court, if the point is not well taken and, if the contrary, reversing and remanding for a new trial.

The two questions also have different status in our Supreme Court. Being a court of law only, we will not review a holding of the Court of Civil Appeals that a verdict is or is not against the great weight and preponderance of the evidence, the holding being considered one of fact. We will, however, review a holding that the verdict is or is not supported by evidence, that matter being one of law. What we actually do with the case depends on the circumstances. For example, if we disagree with the holding of the Court of Civil Appeals that a verdict for the plaintiff is unsupported by evidence, we naturally reverse its judgment in so far as the latter decreed that the plaintiff take nothing; but if the defendant, as appellant

in that court, has also raised the factual question of weight and preponderance, and the court has not expressly passed upon it (having held that there was "no evidence") we must take a further step, since we ourselves cannot decide that question. In this situation we ordinarily assume that the court, having held "no evidence", would also hold the verdict to be against the great weight and preponderance of the evidence, and so we ourselves remand the case for a new trial, although if, for some special reason there were a doubt as to the view of the Court of Civil Appeals, we would remand to the latter court so that it might expressly pass on the weight and preponderance question, and accordingly order a new trial or affirm the trial court judgment, as the case might be.[4]

Sometimes the Court of Civil Appeals, having both points before it, overrules, for example, that of the defendant asserting the verdict to be without support in the evidence but fails to pass on the defendant's affirmative assignment that the verdict is so against the great weight and preponderance of the evidence as to require a new trial. In that situation we consider the failure of the appellate court to rule on the weight and preponderance point to be an error of law requiring us upon proper application to assume jurisdiction and to remand the case to the appellate court with direction to rule, and this although we may agree with its view that the verdict is supported by more than a *scintilla* of evidence. See King v. King, footnote 2, supra.

[4]Hopson v. Gulf Oil Corp.; Barker v. Coastal Builders; Bowman v. Puckett, footnote 2, supra.

In the instant case, as before stated, the Court of Civil Appeals in its first action (275 SW 2d 529) held the finding of negligence of the defendant in failing to furnish proper tools to be unsupported by evidence, reversing the trial court and rendering final judgment for the defendant, without commenting on the assignment concerning weight and preponderance, which latter could have conduced to no more than a new trial. We in turn upheld that judgment by denying writ of error, and the case, going on to the Supreme Court of the United States, was there reversed and remanded to the Court of Civil Appeals, 353 U.S. 925. If we had disagreed with the Court of Civil Appeals in its conclusion of "no evidence", instead of agreeing with it, as we did, we would yet not have affirmed the trial court, but would either have remanded the case to the latter for a new trial (on the above-stated theory that the Court of Civil Appeals had in effect held the finding of negligence to be against the great weight and preponderance of the evidence — a holding beyond our power of review) or would have remanded to the appellate court for an express ruling on the weight and preponderance question (with consequent grant of a new trial or affirmance of the trial court, as the case might be).

When the case returned from the Supreme Court of the United States to the Court of Civil Appeals, the defendant moved the latter court to remand forthwith for a new trial on the theory that the court had in its original opinion (275 SW 2d 529) in effect held the verdict to be against the great weight and preponderance of the evidence, when

it held it to be unsupported by evidence. Alternatively the defendant moved that the court consider and expressly sustain the assignment concerning weight and preponderance and, alternatively, certain other assignments, including one asserting the damages to be excessive. The court (306 SW 2d 171) denied the motion in all respects except as to the damages, which it found excessive in the sum of $5500. It thus in effect affirmed the judgment of the trial court upon condition of a remittitur. Ordinarily it would have either remanded for a new trial on the primary ground stated in the motion, or in any event have proceeded to give its own opinion as to whether the verdict was against the great weight and preponderance of the evidence. But it believed the decision of the Supreme Court of the United States to have foreclosed that question in favor of the plaintiff. Both parties now complain of this judgment of the Court of Civil Appeals. The defendant complains of its failure to remand the case for a new trial (as having by its earlier opinion in effect determined the verdict to be against the great weight and preponderance of the evidence) or to expressly rule upon the latter question and accordingly remand for a new trial. Alternatively, the defendant complains of the court's failure to remand on account of certain alleged errors concerning the pleadings and the charge, hereinafter discussed. The plaintiff, for his part, complains of the required remittitur.

Dealing first with the defendant's contentions concerning the matters of weight and preponderance of the evidence, they do not, of course, ask us to review what we

cannot review, because the Court of Civil Appeals has not exercised its own factual judgment upon the evidence, but has merely held, as a matter of law, that the effect of the reversal by the Supreme Court of the United States was to prevent it from exercising its own judgment on the point, or, perhaps, that the Supreme Court has itself determined that the verdict was *not* against the great weight and preponderance of the evidence. 306 SW 2d 171, 174. We think the Court of Civil Appeals erred in so holding.

The opinion of the Supreme Court and the relevant portions of its mandate of reversal to the Court of Civil Appeals are copied in the footnotes.

In Hopson v. Gulf Oil Corp., cited in footnotes 2 and 4, supra, we had before us almost the same question presented here, although the act under which the suit was brought was the Jones Act instead of the Federal Employers' Lia-

"PER CURIAM: We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. *Rogers v. Missouri Pac. R. Co.*, 352 U. S. 500; *Webb v. Illinois Cent. R. Co.*, 352 U. S. 512; Ferguson v. Moore-McCormack Lines, 352 U. S. 521. The judgment of the Court of Civil Appeals is reversed and the case remanded. Mr. Justice Frankfurter would dismiss the writ as improvidently granted. See his dissent in *Rogers v. Mo. Pac. R. Co.*, 352 U. S. 500, 524. Mr. Justice Harlan and Mr. Justice Whittaker dissent for the reasons given in Mr. Justice Harlan's opinion in *Rogers v. Mo. Pac.*, 352 U. S. 500, 559. Mr. Justice Burton dissents (353 U. S. 925).

"It is ordered and * * * adjudged * * * by this court that the judgment * * * of the said Court of Civil Appeals * * * in this cause be, and the same is hereby, *reversed with costs*.

"IT IS FURTHER ORDERED and adjudged by this Court as follows: We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. Rogers v. Missouri Pacific R. Co., 352 U. S. 500; Webb v. Illinois Central R. Co., 352 U. S. 512; Ferguson v. Moore-McCormack Lines, 352 U. S. 521.

"IT IS FURTHER ORDERED that this cause be, and the same is hereby, remanded to the Court of Civil Appeals of the State of Texas, Eleventh Supreme Judicial District."

bility Act, and the issue was not incident to a judgment of the federal Supreme Court in the same litigation.

In that case, as in the instant one, a trial court judgment for the plaintiff had been reversed by the Court of Civil Appeals and judgment rendered for the defendant on the ground that the finding of negligence of the latter was unsupported by evidence, the court omitting to rule upon the defendant's alternative point that the verdict was against the great weight and preponderance of the evidence. On writ of error to this court, the plaintiff contended that (a) the verdict had support in the evidence and (b) if we should so hold, we should affirm the judgment of the trial court rather than remand the case for a new trial as we would ordinarily do, since the policy of the Supreme Court of the United States in Jones Act and Federal Employers' Liability Act cases was much more liberal than that of the Texas courts in the matter of evidence necessary to uphold verdicts of negligence.

We sustained contention (1) but overruled contention (2) and remanded the case for a new trial on the theory that the plaintiff, by invoking the jurisdiction of the Texas courts, become bound by our established practice in the matter in question.[7]

[7] "Under our established practice, judgment will not be rendered on the jury's verdict, but the cause will be remanded to the district court for another trial. The trial court, on respondent's motion, rendered judgment that petitioner take nothing by his suit, for damages, notwithstanding the jury's findings that respondent's negligence in failing to furnished assistance proximately paused petitioner's injury. On the appeal by petitioner respondent presented in its brief filed in the Court of Civil Appeals several cross-asignments of error, one of them being that the evidence is insufficient to support the jury's answer to issue

(Continued on next page.)

To have held otherwise than we did would have in effect destroyed in cases of this kind the established Texas practice of granting new trials, when the Court of Civil Appeals finds the verdict to be against the great weight and preponderance of the evidence. Congress may, indeed, prescribe rules of substantive law within the federal field and

(Continued)

No. 8, the issue as to proximate cause. This practice is authorized by Rule No. 324 of the Texas Rules of Civil Procedure. The Court of Civil Appeals, in affirming the judgment of the district court, found that there is no evidence to support the jury's answer to issue No. 8. That finding of no evidence includes the lesser finding that the evidence is insufficient to support the answer to issue No. 8, and since the question of insufficiency was presented in the Court of Civil Appeals by respondent's cross-assignment, the cause must be remanded to the district court for a new trial. Liberty Film Lines, Inc. v. Porter, 136 Tex. 49, 53-54, 146 S. W. 2d 982; Bowman v. Puckett, 144 Tex. 425, 133-134, 188 S. W. 2d 571; Najera v. Great Atlantic & Pacific Tea Co., 146 Tex. 367, 371, 20 S. W. 2d 365.

"Relying on recent decisions of the Supreme Court of the United States, which manifest a tendency to sustain on very little evidence verdicts of juries in suits brought under the Jones Act and under the Federal Employers' Liability Act, petitioner in effect takes the position that the established practice in this state should be disregarded and that judgment should be rendered here on the jury's verdict. Among other authorities petitioner cites Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, and Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497. But neither of those decisions nor any other that we have found is authority for departure, in a suit under the Jones Act or under the Federal Employers' Liability Act, from our settled rules of procedure. By the institution of his suit petitioner invoked the jurisdiction of the state courts and the suit should be tried as any other suit for damages for negligence is tried in the state courts, provided there is compliance with the specific requirements of the Federal Statutes, that is to say, that assumed risk and negligence of fellow servants are not to be defenses and contributory negligence not a complete defense, and that the injured seaman or employee is entitled to trial by jury.

"Review of the jury's verdict by the Court of Civil Appeals under its jurisdiction over the facts, with reversal for want of sufficient evidence, does not amount to denial of the right of trial by jury. The Court of Civil Appeals does not and cannot substitute fact findings of its own for the findings of the jury, but in exercising its jurisdiction over the facts the Court of Civil Appeals may reverse the trial court's judgment and remand the case for another trial, when it finds that the verdict is so contrary to the great weight and preponderance of the evidence as to be clearly wrong. The power thus exercised is the same as that exercised by the trial court when it sets aside the jury's verdict on account of insufficient evidence and awards a new trial. And this practice is not a denial of the right of trial by jury. Choate v. San Antonio & A. P. Ry. Co., 91 Tex. 406, 409-410, 44 S. W. 69." (150 Tex. 1, 10-11, 237 S. W. 2d 352, 358.)

permit persons to seek relief there-under in Texas Courts, if Texas opens its courts to such actions, as it does; but obviously Congress would not presume to alter the practice of our courts, so long as it does not transgress constitutional limitations of due process, nor does Texas, by lending its courts for the more convenient operation of federal laws, surrender her right to have her courts follow their own system of practice. Surely it could not be held, for example, that in cases like the present, Congress could require the Texas courts to make use of only general verdicts instead of our usual practice of special verdicts or require that in a jury case a party might always appeal in our courts without regard to our requirement that he must first file a motion for a new trial.

Admittedly the Supreme Court of the United States does take jurisdiction to review the decisions of state courts under the Federal Employers' Liability Act which hold the verdict to be unsupported by evidence and render final judgment accordingly. Conceivably it will go further and review such decisions as merely reverse and remand for a new trial on the factual ground that the verdict, although supported by evidence of more than a scintilla, is yet against the overwhelming weight and preponderance of the evidence. But the latter step has not yet been taken, so far as we are advised, and the authorities cited to us indicate that it will not be.

If it was taken in the instant case, it was not clearly so. In the first place, the point made by the plaintiff in his

petition for *certiorari* was that, and only that, the Court of Civil Appeals, by its action in setting aside the verdict for "no evidence" and accordingly rendering judgment that he take nothing, had deprived him of his right to trial by jury specified in the act. True, he did pray the Supreme Court to affirm the trial court judgment in his favor, but this prayer was in effect denied him when the case was merely remanded to the Court of Civil Appeals, in which the defendant's other assignments of error remained without having been expressly adjudicated, including the assignment concerning the weight and preponderance of the evidence. Orders of the Supreme Court such as here involved are not usually construed as foreclosing further action in the state court except such as may be necessarily inconsistent with the order. Schneider Granite Co. v. Gast Realty & I. Co. U. S. 288. In cases like the present, moreover, the court, where it intends to adjudicate issues undisposed by the court *a quo*, ordinarily so states in unmistakable fashion. See the specific language concerning other assignments in Rogers v. Mo. Pac. R. Co., 352 U. S. 500, and in Webb v. Illinois Central R. Co., 352 U. S. 512.

Moreover, the question of great weight and preponderance of the evidence being, at least under our law, one of fact, there is doubt if the Supreme Court would pass upon it in any event. See Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 393-4.

As to the other attacks of the defendant upon the judgment under review, to wit, its upholding of the action of the trial court in (a) overruling the defendant's special exceptions to the plaintiff's pleading concerning "proper tools", (b) overruling the defendant's objections to the submission of Special Issues Nos. 1, 2 and 3 and related issues concerning the failure of the defendant to furnish "proper tools" and (c) rejecting the defendant's tendered Special Issue No. 5 concerning contributory negligence of the plaintiff "in placing his foot where the babbitt could and did strike same", we agree with the Court of Civil Appeals that none of these assignments presents reversible error.

Thus the, and the only, error which the Court of Civil Appeals has committed to the prejudice of the defendant is to hold, as it did, that the action of the Supreme Court of the United States has foreclosed the exercise of the independent judgment of the former upon the factual question of weight and preponderance of the evidence, depriving the appellate court of its power to reverse and remand for a new trial on that ground. This error requires that the decision below be reversed.

Consistently with our decisions cited in footnote 4, supra, we might ourselves now remand the case to the trial court for a new trial, but considering the peculiar circumstances of this case, and in the hope of making somewhat clearer

the basic issue decided, we shall remand the case to the Court of Civil Appeals with directions to the latter to adjudicate, upon its own independent evaluation of the evidence and wholly apart from the judgment of the Supreme Court of the United States, whether or not the jury finding of negligence of the defendant in failing to furnish proper tools is so against the weight and preponderance of the evidence as to require a new trial in the interest of justice, and, upon the basis of its said adjudication, to either affirm the judgment of the trial court or grant a new trial.

What we have said disposes *a fortiori* of the complaint on the part of the plaintiff concerning that portion of the judgment below requiring the remittitur of $5500. It may be added that the function of the appellate court in this behalf is but another item of its factual jurisdiction and corresponds to the well recognized power of the trial judge to require a remittitur as alternative to granting a new trial. As evidenced by the citations in footnote 3, supra, this power, whether exercised by the Court of Civil Appeals or by the trial judge, is essentially but a part of the power to order a new trial and thus does not usurp the jury function of assessing damages. We find nothing in the Federal Employers' Liability Act or in the decisions of the Supreme Court of the United States purporting to negative the power of the state courts thus to require a remittitur, when the plaintiff invokes their jurisdiction, and certainly nothing in the decision of the Supreme Court in the instant case purporting to inhibit the action, which the Court of Civil Appeals has since taken in this respect.

The judgment of the Court of Civil Appeals is reversed and the cause is remanded to that court for further proceedings in accordance with this opinion.

W. ST. JOHN GARWOOD
Associate Justice

WSJG/p

Opinion delivered:
May 7, 1958

APPENDIX

In the

SUPREME COURT OF TEXAS

May 7, 1958

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,

v.

EARL R. DEEN

From Brown County, Eleventh District

This cause came on to be heard on writs of error to the Court of Civil Appeals for the Eleventh Supreme Judical District, and the original transcript and the transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was error in the judgment of the Court of Civil Appeals, it is *adjudged*, *ordered* and *decreed* that judgment be, and hereby is, reversed and set aside and that this cause be, and hereby is, remanded to the said Court of Civil Appeals for further proceedings in accordance with the opinion herein this day delivered.

It is further ordered that respondent-petitioner, Earl R. Deen, pay the costs in this behalf expended and incurred in this Court; that petitioner-respondent, Gulf, Colorado & Santa Fe Railway Company, have and recover of and from

the said Earl R. Deen the costs by it expended and incurred in this Court, and that this decision, with a copy of the opinion, be certified to the Court of Civil Appeals for the Eleventh Supreme Judicial District for observance.

(Opinion of the Court by Associate Justice Garwood.)

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment of the Supreme Court of Texas in the case of the Gulf, Colorado & Santa Fe Railway Company v. Earl R. Deen, No. A-6584, from Brown County, Eleventh District, as such judgment appears of record in the minutes of said Court under date of May 7, 1958.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 13th day of June, 1958.

GEO. H. TEMPLIN, *Clerk*,
By CARL B. LYDA, *Deputy*

(SEAL)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 133—Miscellaneous

EARL R. DEEN, *Petitioner*

vs.

HONORABLE J. E. HICKMAN, ET AL, *Respondents*

REPLY OF RESPONDENT GULF, COLORADO AND SANTA FE RAILWAY COMPANY TO PETITION FOR MANDAMUS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 133—Miscellaneous

EARL R. DEEN, *Petitioner*

vs.

HONORABLE J. E. HICKMAN, ET AL., *Respondents*

REPLY OF RESPONDENT GULF, COLORADO AND SANTA FE RAILWAY COMPANY TO PETITION FOR MANDAMUS

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Gulf, Colorado and Santa Fe Railway Company, respondent herein, prays that Earl R. Deen's motion for leave to file petition for a writ of mandamus and for a writ of mandamus be dismissed or, in the alternative, that it be denied. Respondent denies jurisdiction and denies error, and in support of these contentions presents the following:

STATEMENT OF THE CASE

The facts of this case and the decisions of the various courts are all reported and set out the nature of the case and the nature of the decisions of the re-

spective courts, and no matter how petitioner or respondent characterizes those holdings, they speak for themselves.

The first opinion is that of the Eastland Court of Civil Appeals (275 S.W. 2d 529), which held that there was no evidence to support the jury's finding that there was negligence on the part of the railroad proximately contributing to the injury in failing to furnish proper tools. The Supreme Court of Texas refused Deen's application for writ of error. Deen applied for certiorari, and the Supreme Court of the United States (353 U.S. 925, 1 L.Ed. 2d 721, 77 S. Ct. 678) overruled the Court of Civil Appeals finding of "no evidence" in a Per Curiam opinion and remanded the case to the Court of Civil Appeals for further proceedings. After that remand, the Court of Civil Appeals at Eastland (306 S.W. 2d 171) refused to consider the Santa Fe's contention that the jury's finding was against the overwhelming weight and preponderance of the evidence and was therefore plainly wrong, but did require a remittitur of $5,500.00, which Deen submitted to; then the Santa Fe (and Deen, also) applied to the Supreme Court of Texas, which granted a writ of error. That court (312 S.W. 2d 933), remanded the case to the Court of Civil Appeals, holding in effect that, while the decision of the Supreme Court of the United States overruling the Court of Civil Appeals finding of "no evidence" was conclusive and decisive on that point and binding upon the Texas Supreme Court, the Court of Civil Appeals, and the trial court, the decision of the Supreme Court of the United States did not pass upon

the issue of "overwhelming weight and preponderance of the evidence," and the mandate of the Supreme Court of the United States did not preclude the Court of Civil Appeals from considering such assignments or from reversing and remanding the case to the trial court for a completely new trial before a different jury. The petition for mandamus is directed not at the Court of Civil Appeals, to whom the mandate went, but to the Supreme Court of Texas.

In the petition for mandamus and in the petition for certiorari, which Deen has filed simultaneously, there are repeated references to the question of the costs in the Supreme Court of the United States, which were taxed against the Santa Fe. Contrary to statement of Deen's counsel, the Santa Fe has never denied that it is liable for such costs, nor has any Texas court so held. Deen's attorneys did file a motion to obtain execution therefor in the Texas Supreme Court prior to any decision or judgment by that court. The Texas Supreme Court instructed its clerk (March 25, 1958) to advise Deen's counsel that the demand for execution was not granted "at that time." This merely followed the usual practice not to issue piecemeal executions for appellate costs. As is true in most jurisdictions, where an appeal passes through several courts, the right to an execution does not accrue until the appeal has been finally disposed of. Merely to keep the record straight, the Santa Fe repeats that it is liable for the costs assessed against it in the United States Supreme Court on the former appeal, that it expects to pay them when this appeal is finally disposed of, subject to such offsets as it may be entitled

to by reason of costs it has incurred and paid and which are assessed by any court against Deen.

JURISDICTION

While the respondent (Santa Fe) concedes that under the judicial code *(28 U.S.C.A., Sec. 1651)* and under its own rules *(Rules 30 and 31)*, the Supreme Court of the United States has authority to issue a mandamus, it denies that such jurisdiction exists to issue a mandamus to a state court in a cause where no final judgment has been entered and no substantial federal question is raised, as required by the judicial code *(28 U.S.C.A., Sec. 1257)*.

QUESTIONS PRESENTED

I. Jurisdiction. As above set out.

II. Whether the fact that this is a Federal Employers' Liability Act case creates an exception to the uniform rule that the Supreme Court of the United States will never issue a mandamus where a petitioner has the right of review by certiorari or appeal.

III. Whether the mandate of the United States Supreme Court in this case, which remanded the cause for further proceedings, should have been construed by the Texas courts as a mandate ordering the affirmance of the trial court's judgment, without the right to consider matters not disposed of by the United States Supreme Court.

ARGUMENT WITH REFERENCE TO JURISDICTION

This argument relates to jurisdiction in the loose sense, so as to cover both the first and second "Questions Presented." We concede the inherent jurisdiction of any court to issue mandamus, which in the case of the United States Supreme Court is confirmed by the judicial code and its own rules. What we question is whether the power of mandamus of the United States Supreme Court of the United States can and should be used to expand its control over state court proceedings, where no right under the United States Constitution has been denied to a litigant. Deen's statements with reference to the finality of the decision of the Supreme Court of Texas are not correct, but solely for the purpose of this point, if we concede that the decision of the Supreme Court of Texas constituted a remanding to the trial court for a new trial, no federal question is presented.

Since the beginning of our judicial system (see *Steimmetz vs. Currey*, 1 Dal. 234, 1 U.S. 234, 1 L.Ed. 115) the granting of a new trial because the jury's verdict was against the overwhelming weight or preponderance of the evidence has been held not to be the denial of a right of trial by jury. This holding is universal. *50 C.J.S., Sec. 128, p. 854; 31 Am. Jur. Sec. 17, p. 24.* Among the cases by the United States Supreme Court so holding are:

Sinclair vs. Cooper, 108 U.S. 352, 27 L.Ed. 751; 2 S.Ct. 754

Metropolitan R.R. Co. vs. Moore, 121 U.S. 558, 30 L.Ed. 1022, 7 S.Ct. 1334;
L. & N. R. Co. vs. Woodson, 134 U.S. 614, 33 L.Ed. 1032, 10 S.Ct. 628;
Montgomery Ward & Co. vs. Duncan, 311 U.S. 243, 85 L.Ed. 147, 61 S.Ct. 189;
Arkansas Valley L. & C. Co. vs. Mann, 130 U.S. 69, 32 L.Ed. 854, 9 S.Ct. 458;
L. & N. R. Co. vs. Holloway, 246 U.S. 525, 62 L.Ed. 867, 38 S.Ct. 379;
Dimick vs. Schiedt, 293 U.S. 474, 79 L.Ed. 603, 55 S.Ct. 296;
Koenigsberger vs. Richmond Silver Mining Co., 158 U.S. 41, 39 L.Ed. 889, 15 S.Ct. 751.

A few of the circuit court cases are:

Daffinrud vs. U. S. (7th Cir.) 145 F. 2d 724;
Aetna Casualty & Surety Co. vs. Yeatts, 122 F. 2d 350;
Cheffey vs. Penn R. Co., 79 F.Supp. 254.

Probably the most frequently cited case by a federal court on this point is *Mt. Adams & E. P. Ry. Co. vs. Lowery* (6th Cir.) 74 F. 463, which contains an extensive review of many state and federal cases.

Every state court recognizes that the power of the trial judge to grant a new trial because the verdict is against the overwhelming weight and preponderance of the evidence is not a denial of a right of trial by jury. Some states follow the same rule as the United States Supreme Court, that is, hold that such power is confined to the trial court and that an appellate court

is limited to the law question of whether there was enough evidence to require the submission of the case to the jury. Other states, like Texas, grant authority to an appellate court to exercise the same discretion that the trial court exercised and to set aside a verdict as being against the overwhelming weight and preponderance of the evidence. As might be expected, there is some divergence among the states as to the exact application of the right of an appellate court to reverse a verdict because against the overwhelming weight and preponderance of the evidence. Some state that the appellate court has the same discretion as the trial court. Others, while stating that the appellate court has such power, state that as a matter of policy it should be exercised with caution. There are variations between these two extremes.

We do not have a complete tabulation of all of the states as to whether or not under their practice an appellate court may reverse and remand because the verdict is against the overwhelming weight and preponderance of the evidence. Of the states which we have reviewed, slightly more than fifty per cent recognize that power in both the trial court and in the appellate court. All of the states recognize the power one place or the other, and all of the states hold that granting such new trial is not a denial of a trial by jury. The following list on a "one case per state basis" contains both the states where the right to grant a new trial because the verdict is against the overwhelming weight and preponderance of the evidence is confined to the trial court and those which grant the same power to an appellate court. Since in both situations

it is uniformly held that there is no denial of a trial by jury as a result of such principle, we are listing them without discrimination:

Perry vs. Fowler (Cal.) 229 P. 2d 46;
Fell vs. Hancock Mutual Life Ins. Co., 76 Conn. 495;
L. & N. R. Co. vs. Grant (Ky.) 27 S.W. 2d 980;
Bannister vs. N.C. & St. L. Ry. (Tenn.) 3 S.W. 2d 1053;
Pruitt vs. West V. N. R. Co. (W.Va.) 51 S.E. 2d 105;
Camp vs. Atlantic C. R. Co. (Ala.) 36 So. 2d 331;
White vs. McCoy (Miss.) 7 So. 2d 886;
Murphy vs. Palmer (R.I.) 73 R.I. 182;
Bradley vs. Philhower (Ariz.) 299 P. 2d 648;
Gossard vs. Watson (Colo.) 221 P. 2d 353;
McDonald vs. Metro St. Ry. (N.Y.) 60 N.E. 2d 282;
Loftin vs. Howard (Fla.) 82 So. 2d 125;
Burke vs. Reiter (Iowa) 40 N.W. 2d 907;
Ireton vs. Ireton (Kan.) 63 Pac. 429;
Winslow vs. Fisher (Ind.) 37 N.E. 2d 280;
Benson vs. Georgia S. & F. Ry. (Ga.) 115 Ga. 330;
Triplett vs. Beeler (Mo.) 268 S.W. 2d 814;
Hawley vs. Powell (N.C.) 24 S.E. 2d 523;
Byers vs. Vargo (Pa.) 133 A. 2d 163;
St. L. & S. F. R. Co. vs. King (Okla.) 278 P. 2d 845;
James vs. Hood (N.M.) 19 N.M. 234.

In Texas, and in some of the other states, the intermediate appellate court is given this jurisdiction and it is denied to the Supreme Court, and in others the jurisdiction is vested in the Supreme Court. Irrespective of that, all of the authorities hold that where the reversing for a new trial by the appellate court has the same effect as the granting of a new trial by the trial court, there is no denial of any constitution's requirement of a jury trial. For example, the Supreme Court of the United States, in *Metropolitan R.R. Co. vs. Moore* (supra) had a District of Columbia statute dealing with the granting of a new trial or the requiring of a remittitur by judges other than the judge who tried the case, recognized the variety of practice and that some states vested this authority in both the trial and in the appellate court. Deen has cited no case to the contrary, and because of the universality of the holding that the granting of a new trial by either a trial court or an appellate court is not the denial of a trial by jury, we assert with more than the usual certainty that there is no case or authority so holding.

Many courts consider the principle to be the same as the authority of the trial court and the appellate court, where authorized by statute or constitution of the particular state, to require a remittitur because of the same essential finding, that is, that the jury's award is excessive and against the overwhelming weight and preponderance of the evidence. This has been held time and time again not to deny a jury trial.

Arkansas Valley L. & C. Co. vs. Mann, 130 U.S. 69, 32 L.Ed. 854, 9 S.Ct. 458;

Southern Ry. vs. Bennett, 233 U.S. 80, 58 L. Ed. 860, 34 S.Ct. 566;

T. & P. Ry. Co. vs. Hill, 237 U.S. 208, 59 L.Ed. 918, 35 S.Ct. 575;

L. & N. R. Co. vs. Holloway, 246 U.S. 525, 529, 62 L.Ed. 867, 870, 38 S.Ct. 379;

S.L. I.M. & S. Ry. Co. vs. J. T. Craft, 237 U.S. 648, 661, 59 L.Ed. 1160, 1165, 35 S.Ct. 704;

N. Y. Central and Hudson River R. Co. vs. Fraloff, 100 U.S. 24, 32, 25 L.Ed. 531, 534;

New York L. E. & W. R. Co. vs. Winter, 143 U.S. 60, 75, 36 L.Ed. 71, 80, 12 S.Ct. Rep. 356;

Herencia vs. Guzman, 219 U.S. 44, 55 L.Ed. 81, 31 S.Ct. Rep. 135.

For example, in *S.L. I.M. & S. Ry. Co. vs. Craft* (supra) there was an F.E.L.A. trial court judgment for the plaintiff in the amount of $11,000.00, the state Supreme Court required a remittitur of $5,000.00, and the Supreme Court of the United States said (59 L.Ed., p. 1165):

> "* * * the power, and with it the duty and responsibility, of dealing with this matter, rested upon the courts below. It involves only a question of fact, and is not open to reconsideration here."

We say, therefore, that there is no federal question involved and no jurisdiction.

Jett Brothers Distilling Co. vs. Carrollton, 252 U.S. 1, 64 L.Ed. 421, 40 S.Ct. 255;

McGoldrick vs. Gulf Oil Corp, 309 U.S. 2, 60 S.Ct. 375, 84 L.Ed. 536;

Stembridge vs. Georgia, 343 U.S. 541, 72 S.Ct. 834, 96 L.Ed. 1130;

Bachtel vs. Wilson, 204 U.S. 36, 27 S.Ct. 243, 51 L.Ed. 357.

MANDAMUS WILL NOT LIE

If we are wrong about jurisdiction, we are certainly not wrong about the proposition that mandamus will not be granted by this Court to any petitioner who could, at the time of the filing of the petition or at any future time, present his rights to the Supreme Court of the United States by appeal or certiorari.

Bankers Life & Casualty Co. vs. Holland, 74 S.Ct. 145, 346 U.S. 379, 98 L.Ed. 106;

Roche vs. Evaporated Milk Association, 63 S.Ct. 938, 319 U.S. 21, 87 L.Ed. 1185;

Ex Parte Fahey, 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 204;

Bank of Columbia vs. Sweeney, 26 U.S. 567, 7 L.Ed. 265;

American Construction Co. vs. Jacksonville, etc., Ry. Co., 148 U.S. 372, 13 S.Ct. 758, 37 L.Ed. 486;

State of Maryland vs. Soper, 46 S.Ct. 185, 270 U.S. 9, 70 L.Ed. 449;

Ex Parte Newman, 81 U.S. 152, 20 L.Ed. 877;

In Re Blake, 175 U.S. 114, 44 L.Ed. 94, 20 S.Ct. 42;

Ex Parte Roe, 234 U.S. 70, 58 L.Ed. 1217, 34 S.Ct. 722.

The classic statement is contained in the following quotation from *Ex Parte Newman*, supra (20 L.Ed. p. 879):

> "Application for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a court, having heard the cause, refuses to render judgment or enter a decree in the case; but the principles and usages of law do not warrant the use of the writ to re-examine a judgment or decree of a subordinate court in any case, nor will the writ be issued to direct what judgment or decree such a court shall render in any pending case, nor will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal, as the only office of the writ when issued to a subordinate court is to direct the performance of a ministerial act, or to command the court to act in a case where the court has jurisdiction and refuses to act; but the supervisory court will never prescribe what the decision of the subordinate court shall be, nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy."

The most recent case (*Bankers Life & Casualty Co. vs. Holland*) reiterated the same principles.

Petitioner apparently recognizes the applicability of the foregoing principles and seeks to avoid same by charging a misconstruction or disregard of the mandate of the Supreme Court of the United States. This exact point has already been decided adversely to petitioner in *In Re Blake* (supra), which said:

> "Nevertheless, without inquiring whether the conclusions of the Supreme Court of Tennessee were or were not in harmony with the views expressed by this court, we are of the opinion that the remedy of petitioners for the alleged error in the decree of that court, if any, is by writ of error and not by mandamus."

Ex Parte Roe (supra) contains the same holding. As a matter of fact, in *Ex Parte Texas*, 315 U.S. 8, 86 L.Ed. 579, 62 S.Ct. 418 mandamus to a Texas court was denied after a mandate by the Supreme Court of the United States, when the Texas Supreme Court pointed out that the Court of Civil Appeals' jurisdiction to reverse and remand included the authority to reverse and remand because the finding of the jury was against the overwhelming weight and preponderance of the evidence, in which case a new trial would be granted. The concluding paragraph of that opinion reads:

> "We must accept the return of the Texas judges regarding the scope of judicial review of orders of the Texas Railroad Commission, as well as their showing *regarding the distribution of judicial powers within the Texas judicial system. These are matters of local law.*" (Italics ours.)

Simply stated, the fact that there is a contention made, sound or unsound, that the mandate of this Court has been misconstrued or not properly applied does not take the case out of the general rule that mandamus will not lie where there is a remedy by certiorari or appeal.

Petitioner next seeks to escape the universal principle above set out by contending that mandamus is essential because certiorari will not lie at the present time.

He is, of course, correct that a judgment which merely remands a case for a new trial is not a final judgment which will sustain certiorari. See *Market Street R. Co. vs. R. R. Commission*, 324 U.S. 548, 65 S.Ct. 770, 89 L.Ed. 1171, and the authorities on this point in the Santa Fe's reply to Deen's petition for certiorari in this same cause. If that were grounds for granting a mandamus, then every case in which there was a remand would become one in which mandamus was proper. Put another way, Deen argues, this judgment is not final, therefore mandamus will lie. This is in direct conflict with the decisions of the Supreme Court of the United States and the statute itself, which requires a "final judgment" before jurisdiction of the United States Supreme Court attaches. More practically, to sustain the contention would mean that where a state court remanded any cause for a new trial, mandamus would lie if certiorari would not. This, of course, is another way of saying that mandamus would take the place of certiorari in remanded causes.

See, for example:

Ex Parte Whitney, 13 Pet. 404, 10 L.Ed. 221;
Maryland vs. Soper, 46 S.Ct. 185, 270 U.S. 9, 70 L.Ed. 449.

In addition, of course, the granting of a mandamus would be an attempt to supervise the exercise of the judicial discretion vested in the state court. That mandamus will not be issued for such purpose is illustrated by:

Holloway vs. Whitely, 4 Wall (U.S.) 522, 18 L.Ed. 335;
Interstate Commerce Commission vs. United States, 289 U.S. 393, 77 L.Ed. 1278, 53 S.Ct. 607;
Life & F. Ins. Co. vs. Adams, 9 Pet. 573, 9 L.Ed. 234;
In Re Morrison, 147 U.S. 14, 37 L.Ed. 60, 13 S.Ct. 246;
Ex Parte Flippin, 94 U.S. 348, 24 L.Ed. 194;
In Re Burdett, 127 U.S. 771, 32 L.Ed. 321, 8 S.Ct. 1394.

However, if the Texas courts have misconstrued the mandate of this Court, or have denied Deen any right guaranteed to him by the United States Constitution, or by any statute passed by Congress, the remanding of the case to the trial court for a new trial will not deprive him of the right to assert the error which he now complains of, when this case is finally disposed of. There are many cases so holding, but the most obviously in point is the case of *Urie vs. Thomp-*

Urie, 337 U.S. 163, 93 L.Ed. 1282, 69 S.Ct. 1018. This was an F.E.L.A. case seeking recovery by a fireman from the receiver of a railroad for silicosis contracted during his employment. On the first trial in the state courts of Missouri, the Supreme Court of Missouri denied a recovery on the theory that the Federal Employers' Liability Act did not authorize a recovery for an occupational disease. The Supreme Court of Missouri reversed and remanded the cause to the trial court. It was tried a second time in the trial court under amended pleadings where the plaintiff sought to recover under the Boiler Inspection Act. On the second appeal, the Missouri Supreme Court denied a recovery on that ground. The Supreme Court of the United States, in its decision, expressly and positively held that, even though Urie did not raise the same point in the Missouri Supreme Court on the second appeal, he could, after judgment on the second appeal, apply to the Supreme Court of the United States for certiorari for a review by the Supreme Court of the United States of the ruling by the Supreme Court of Missouri on the first appeal. While there was a dissent, the dissent was on the merits and not on a point here important. Therefore, if Deen had been deprived of any right guaranteed him by the Constitution or statutes of the United States (which he has not), his rights to have the point decided by certiorari is certainly guaranteed by the Urie case, as well as many prior cases to the same effect.

There is one technical point that should be mentioned. The mandate of the Supreme Court of the United States went to the Court of Civil Appeals at

Eastland. Deen does not complain of the decision of the Eastland Court of Civil Appeals, and in effect asks that the Supreme Court of the United States mandamus the Supreme Court of Texas to affirm the judgment of the Court of Civil Appeals. The petition here for mandamus is directed at the Texas Supreme Court. The Texas Supreme Court remanded the cause to the Court of Civil Appeals at Eastland, and Deen, instead of waiting until the case got to the Eastland Court of Civil Appeals, filed a motion in the Supreme Court of Texas to have the mandate recalled, so that he could proceed directly against that court. Deen by his own actions has prevented the cause from going to the Eastland Court of Civil Appeals, to whom the mandate of the Supreme Court of the United States went. Quite obviously, his correct remedy, if he has a remedy by mandamus, was to have the mandate of the Supreme Court of Texas go to the Eastland Court of Civil Appeals and then apply to the Supreme Court of the United States for mandamus directed to that court, requiring it to follow the mandate of the Supreme Court of the United States and not that of the Texas Supreme Court.

Again we repeat that the Supreme Court mandate has not been disregarded, nor has Deen been deprived of any "federal right", but if he was, he certainly sought mandamus at the wrong time against the wrong court. The reason for this is obvious, and that is that the Court of Civil Appeals, under the mandate of the Texas Supreme Court, may hold exactly what Deen wants it to hold, that is, that the verdict of the Texas jury was not against the overwhelming weight

and preponderance of the evidence. If it does so hold, Deen's mandamus application is entirely unnecessary, and until the Court of Civil Appeals has remanded this cause for a new trial, any application for mandamus is certainly premature. Further, until the Court of Civil Appeals acts, any mandamus by this Court would be the supervision by this Court of the exercise by the Eastland Court of Civil Appeals of its judicial discretion.

Deen's final contention for mandamus seems to be in effect that, because this is an F.E.L.A. case, there is an automatic exception in his favor to all provisions of the Constitution, the statutes, rules of court, and decisions. Deen apparently construes the comments of Justices Jackson, Roberts, and Frankfurter in dissenting opinions, as well as those of various circuit court and state court judges, as recognizing an intention by the majority of the Supreme Court of the the United States to create, in F.E.L.A. plaintiffs, a preferred class of litigants for whom exceptions will be found to all rules, which exceptions are not available to other litigants. If that position correctly represents the intention of this Court, then, of course, mandamus will lie in this case. The respondent's answer to that contention is that this Court has not yet so held, and until it does, we construe the principle "equal justice under law" as prohibiting a favored class of litigants.

Lastly, as evidence of the desire and intent of Deen to have a "piecemeal appeal" under the guise of mandamus, we call the Court's attention to the fact that he not only wants the Supreme Court of Texas

mandamused, but he wants the mandamus to be "without prejudice to Deen's right to seek review of such remittitur by this Court by petition for writ of certiorari." See motion for leave to file petition for mandamus, p. 18.

It is respectfully submitted that Deen's petition for mandamus should be denied or dismissed.

ON THE MERITS

Under this general heading we will present argument under the third "Questions Presented", above set out, the substance being that the Supreme Court of Texas did not disregard the mandate of the United States Supreme Court in this cause. The opinion of the Supreme Court of Texas is a complete answer to Deen's entirely unwarranted statements that the Supreme Court of Texas deliberately and intentionally disregarded the mandate of the Supreme Court of the United States. If "advocate's license" can be used to excuse reputable counsel for making such a charge, certainly it must be said that the record in this case on its face conclusively denies that there was any justification for it.

The Texas Supreme Court, in its opinion, carefully and with clarity explained not only why its decision was not in disregard of the mandate of the Supreme Court of the United States, but also with equal care and with equal lucidity explained what it was doing and why it was doing it. Because of the care and detail of the Texas Supreme Court's opinion, it may be presumptuous for counsel to elaborate or present ar-

guments in support of it. But with the statement, "Fools rush in where angels fear to tread," and the excuse that Deen, both in his petition for mandamus and in his petition for certiorari, has not correctly stated either the decision of the Supreme Court of Texas nor the reasons for it, we present an argument.

In our hurry to reach the principle points, we are passing over a number of incorrect statements in Deen's petition for mandamus and his petition for certiorari. Some of these will be picked up as we go along, but rather than be involved in a bicker, we will merely state the record correctly in most instances without commenting on the fact that Deen has stated it to the contrary.

The question presented by Deen is:

> "Whether The Supreme Court of Texas has violated the mandate of the Supreme Court of the United States in directing the Court of Civil Appeals of Texas to inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury, etc." (See Petition for Mandamus, p. 10.)

Of course, that is not what the Supreme Court of Texas did at all. What the Supreme Court of Texas decided were two questions (see 312 S.W. 2d 933):

> "The principal questions are narrow ones involving the impact of the Supreme Court judgment of reversal upon the factual jurisdiction of our Courts of Civil Appeals. The factual powers in question are: (a) that of reversing and remanding for a new trial, when the court believes

> the verdict or the fact findings of the trial judge to be so against the great weight and preponderance of the evidence as to be manifestly wrong notwithstanding they may be supported by some evidence of substantial character; (b) that of requiring as a condition of affirmance and alternative to reversal and remand for a new trial a remittitur of such portion of the damages as the court considers excessive."

Deen's attorney states time and time again that the Supreme Court of the United States passed on the "weight and preponderance of the evidence" when it reversed the holding of the Texas Court of Civil Appeals that there was "no evidence" to justify the submission of the issue. The Texas Supreme Court's opinion contains a correct statement of the distinction between a holding by a trial or appellate court that there was enough evidence to justify the submission of the case to the jury and to prohibit the direction of a verdict or the reversal and rendition by the appellate court, and a holding by the trial court or by the appellate court, that, although there was enough evidence to justify the submission of the case to the jury, the whole evidence requires the court to grant a new trial because the verdict is against the overwhelming weight and preponderance of the evidence. Deen's two petitions (certiorari and mandamus) would lead one to believe that this distinction was discovered by the Supreme Court of Texas in this case, whereas the very distinction was made thousands of times by hundreds of different courts.

The following quotations negative such contention.

We would first like to refer the Court to *Metropolitan R. R. Co. vs. Moore*, 121 U.S. 558, 30 L.Ed. 1022, 7 S.Ct. 1334, and the whole opinion of this Court in that case, from which we take the following quotations, which we think are the essence of that holding. The quotations begin on page 1024, 30 L.Ed. page 567, 121 U.S.

> "Upon this point, the Supreme Court of the District of Columbia, in *Stewart v. Elliott*, 2 Mackey, 307, 315, said: 'By a loose use of language, it may be said that a verdict "*contrary to the evidence*," or "against the weight of evidence;" was rendered upon "*insufficient evidence;*" and, on the other hand, that a verdict upon insufficient evidence is one contrary to or against the weight of evidence. But we are dealing with legal expressions in their technical meaning; and it is familiar to all lawyers that evidence offered to a jury in a cause has a two-fold sufficiency, i.e., sufficiency in law and sufficiency in fact; that of its sufficiency *in law* the court is the exclusive judge; its sufficiency *in fact* is a question exclusively for the jury. The court, in considering the legal sufficiency of the evidence to sustain the case of a suitor, or to establish any particular fact essential to his recovery, must examine the proof with respect to its quality and quantity; and this determination by the court is a question of law. And if the court can see that the proof offered is of such a character and volume that it might well satisfy a rational mind of the truth of the position it is introduced to maintain, then it is declared to be *legally sufficient* for the purpose; and it must be submitted to the jury, who are the exclusive judges of its sufficiency *in fact*, whether others

may differ from them in their conclusions or not . . . .'"

* * * * *

". . . It is admitted that according to established rules of procedure in such cases, it is customary and proper for courts of justice, sitting in the trial of causes by jury, to set aside verdicts and grant new trials in both classes of cases; that is, where the verdict rests upon evidence which is either insufficient in law or insufficient in fact."

* * * * *

"So upon the whole evidence in the case the testimony in support of the cause of action, or of the defense, may be so slight, although competent in law, or the preponderance against it may be so convincing, that a verdict may be seen to be plainly unreasonable and unjust. In many cases it might be the duty of the court to withdraw the case from the jury, or to direct a verdict in a particular way; and yet, in others, where it would be proper to submit the case to the jury, it might become its duty to set aside the verdict and grant a new trial."

* * * * *

". . . It is true that motions to grant a new trial, upon the ground that the verdict is against the weight of the evidence, are, in a certain sense, addressed to the discretion of the court, and can be more satisfactorily dealt with by the judge who tried the cause and who had the opportunity of seeing the witnesses and hearing them testify. And this furnishes one of the reasons why ordinarily a writ of error or an appeal will not lie for the purpose of revising and controlling the exercise of that discretion by an appellate tribunal; yet in some of the States a contrary practice prevails, and a writ of error is authorized

to bring up for review the proceedings and judgment of an inferior court, on which it may be assigned as an error in law, upon a bill of exceptions setting forth the whole evidence, that the court below error in not granting a new trial because the verdict was against the weight of the evidence."

* * * * *

"It is urged in argument, however, that the error did not prejudice the plaintiff in error, because the court necessarily passed upon the same matter in considering and sustaining the ruling of the court at special term in refusing to instruct the jury to return a verdict in favor of the defendant upon the evidence offered by the plaintiff; but the question arising on this ruling, and that on the motion for a new trial at the conclusion of the whole evidence, were not identical. It might well be that on the plaintiff's evidence there was a case sufficiently made out to submit to the jury, while on the whole testimony it might fairly be a question whether the verdict was not against the weight of the evidence, in that sense which would justify the court in granting a new trial. Of course nothing we have said in this opinion is to be construed as indicating any rule of decision in such cases, or is intended in the least to narrow the province of the jury as the proper tribunal for determining questions of fact in trials at common law. The relation of the court to the jury, together constituting the appointed tribunal for the administration of the law in such cases, is regulated by fixed and settled maxims. The legal discretion of the Supreme Court of the District, whether sitting at general or special term, in granting or denying motions to set aside verdicts and grant new trials, is not

> by law submitted to the review of this court. The only point in judgment here is that the plaintiff in error was entitled by law to have that discretion exercised by the supreme court at general term, and that that court committed an error of law in refusing to consider his appeal from the order at special term denying his motion for a new trial, based on the ground that the verdict was against the weight of the evidence.
>
> "*For this error, the judgment of the Supreme Court of the District of Columbia at General Term is reversed, and the cause remanded, with directions to take further proceedings therein in conformity with this opinion.*"

An assertion that the *Moore* case is in point would seem to be a vast understatement. The Supreme Court of the United States in that case had before it exactly the same point that the Supreme Court of Texas had before it in the Deen case. The Supreme Court of the United States made the same distinction between "no evidence" and the "overwhelming weight and preponderance of the evidence" that the Texas Supreme Court made in the Deen case, and the Supreme Court of the United States, because of the error of a lower court in refusing to pass on "the weight and sufficiency of the evidence", remanded the *Moore* case to the lower court with instructions to do exactly what the Texas Supreme Court instructed the Court of Civil Appeals to do in this case, that is, pass on the question of whether the verdict was against the overwhelming weight and preponderance of the evidence. Unless Shepard's Citator has missed it, the *Moore*

case has never been overruled or qualified on this point.

A shorter and less detailed statement of the same principles recognized and applied in the *Moore* case is contained in the following quotation from *Garrison vs. United States* (4th Cir.), 62 F. 2d 41, p. 42:

> "There seems to be some confusion on the part of counsel as to the difference between the duty to direct a verdict and the duty to grant a new trial after verdict; and the contention is frequently made that the judge should direct a verdict whenever the evidence is such that he would be justified in setting the verdict aside. The distinction, however, is clear. Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence which is false; for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice."

We have heretofore stated, and again state, that every court whose decision we have read makes exactly the same distinction that the Texas Supreme Court makes, that this Court made in the *Moore* case and in others, and that the Circuit Court made in the

foregoing quotation. Rather than repeat unnecessarily a matter which is not subject to dispute, we respectfully refer the Court to the authorities from the circuit courts and the state courts listed on pages 5, 6 & 8 of his brief.

Therefore, we say that the plaintiff's assertion that the Supreme Court of the United States passed on the question of "the overwhelming weight and preponderance of the evidence" is untrue, as is his assertion that the distinction made by the Supreme Court of Texas is unjustified. As a matter of fact, the Supreme Court of the United States has held very consistently that it does not have jurisdiction to pass upon issues of the overwhelming weight and preponderance of the evidence. Some of these cases have heretofore been cited or quoted from. For ready reference, however, on this point, we refer to:

Smiley vs. Kansas, 196 U.S. 447, 25 S.Ct. 289, 49 L.Ed. 546;

Aetna Life Ins. Co. vs. Dunken, 266 U.S. 389, 45 S.Ct. 129, 69 L.Ed. 342;

Great A. & P. Tea Co. vs. Supermarket Equipment Corp., 340 U.S. 147, 95 L.Ed. 162, 71 S.Ct. 127;

Graver Tank & Mfg. Co. vs. Linde Air Products Co., 336 U.S. 271, 93 L.Ed. 672, 69 S.Ct. 535.

If this Court passed on the "overwhelming weight and preponderance of the evidence" in the first certiorari in this Deen case, then it has the power to do

so in all cases. If it has the power to pass on the overwhelming weight and preponderance of the evidence, it is not, like the Supreme Court of Texas, a court passing only on questions of law and without jurisdiction of fact issues. If it has no such power, then certainly it did not pass on the question of overwhelming weight and preponderance of the evidence in the former appeal in the Deen case.

As the Texas Supreme Court not unreasonably points out, since the Supreme Court of the United States has stated time and time again that it does not have jurisdiction to pass upon the "overwhelming weight and preponderance of the evidence", its decision and mandate in the Deen case cannot justly be construed as covering that very point. Put in reverse, Deen's contention is that the Supreme Court of the United States has a right, in F.E.L.A. cases, to pass on the overwhelming weight and preponderance of the evidence, which it does not have in other cases. If it has no such authority and jurisdiction, certainly it did not do so in this case.

We know no authority, and certainly Deen has cited none, for the proposition that a petition for mandamus can be used to serve the purpose of a motion for rehearing. That is the substance of what Deen is trying to do by his petition for mandamus, and that is to ask the Supreme Court of the United States to amend its mandate and to decide questions not decided by it on the original hearing.

Next, let us deal briefly with the law applicable to causes remanded by the Supreme Court of the United

States to the state court.

The first case to which we wish to refer this Court is *Schneider Granite Co. vs. Gast Realty & I. Co.*, 245 U.S. 288, 62 L.Ed. 292, 38 S.Ct. 125. We make the following quotations from 62 L.Ed., p. 294:

> "A judgment of the supreme court, which had affirmed a judgment of the circuit court of the city of St. Louis sustaining the tax (259 Mo. 153, 168 S.W. 687), *was reversed, and the cause remanded for further proceedings not inconsistent with the opinion of this court* (240 U.S. 55, 60 L.Ed. 523, 36 Sup.Ct.Rep. 254)." (Italics ours.)
>
> * * * * *
>
> "These contentions must be tested by the true intent and meaning of the mandate of this court, and, so tested, both must be overruled. *The mandate, while reversing the judgment that was under review on the former writ of error, permitted further proceedings of any kind to be had in the state courts, provided they were not inconsistent with the opinion of this court. It left the tribunals of the state at liberty to exercise their proper jurisdiction in the cause between the parties, so long as they avoided a conflict with the rights of the landowners under the 14th Amendment, as established by our decision.*" (Italics ours.)

The next case is *Georgia Ry. & Electric Co. vs. Decatur*, 297 U.S. 620, 56 S.Ct. 606, 80 L.Ed. 925, and we quote from 80 L.Ed., p. 927:

> "April 29, 1935 (295 U.S. 165, 79 L.ed. 1365, 55 S.Ct. 701), we reversed the decree pronounced by the Supreme Court of Georgia in this cause, September 18, 1934 (179 Ga. 471, 176 S.E. 494),

and sent it back for further proceedings not inconsistent with the accompanying opinion."

* * * * *

"After the first decree was reversed and set aside, the cause went back for disposition by the Supreme Court. Our mandate restricted its powers in that regard so far as necessary to prevent conflict with rulings here, but not otherwise. Only federal questions were open for our determination. We accepted the construction placed upon the statutes by the Supreme Court and held that so to apply them would deprive appellants of a federal right. We suggested no interpretation of our own and did not affirmatively indicate the further action to be taken. Schneider Granite Co. v. Gast, 245 U.S. 288, 291, 62 L.ed. 292, 295, 38 S.Ct. 125. The decree now under consideration is not in conflict with anything said or done by us. Appellants' claim to the contrary is not well founded. Without exceeding the limitations prescribed, the Supreme Court reconsidered the cause, put its own construction upon the statutes, and adjudged accordingly."

The third case is *Sprague vs. Ticonic National Bank*, 307 U.S. 171, 59 S.Ct. 777, 83 L.Ed. 1184.

That the above cases are still the law is evidenced by the following quotation from Judge Frankfurter's opinion in that case (83 L.Ed., p. 1188):

"But that leaves us still to consider whether the immediate issue now in controversy was disposed of in the main litigation and therefore by the mandate. While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues. See Re Sanford Fork & Tool Co., 160 U.S. 247, 40 L.ed. 414,

16 S.Ct. 291; Ex parte Century Indem. Co., 305 U.S. 354, ante, 216, 59 S.Ct. 239."

We know of no reason (and Deen's attorney certainly presents none) why the above rules are not applicable to Federal Employers' Liability cases. State courts have uniformly so construed them. See, for example:

Ellis vs. Union Pack R. Co., 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572; after remand to the state court, 27 N.W. 2d 921;

Keeton vs. Thompson, 326 U.S. 689, 67 S.Ct. 598, 91 L.Ed. 572; after remand to the state court, 191 S.W. 2d 954;

Pauly vs. McCarthy, 330 U.S. 802, 67 S.Ct. 962, 91 L.Ed. 1261; after remand to the state court. 184 P. 2d 123;

Stone vs. New York C. & St. L. R. Co., 344 U.S. 407, 73 S.Ct. 358, 97 L.Ed. 441; after remand to the state court, 260 S.W. 2d 532.

When the Supreme Court of the United States wants to preclude the state court from considering assignments it did not pass on, it does so in positive and unequivocal language. That can be demonstrated quickly and conclusively by using only one advance sheet. If the Court will look in the Lawyers' Edition railroad cases, or Jones Act cases, reported. Three of these are cited in the opinion of the Supreme Court of advanced sheet for March 11, 1957, it will find five the United States in the Deen case. They are:

Rogers vs. Missouri Pacific R. Co., 353 U.S. 500, 1 L.Ed. 2d 493;

Webb vs. Illinois Central R. Co., 352 U.S. 512, 1 L.Ed. 2d 503;

Ferguson vs. Moore-McCormick Lines, Inc., 352 U.S. 521.

Let us take those three cases and see what the Supreme Court of the United States did when it did in fact consider matters included in the state court brief but not passed on there.

We quote from the *Rogers* case (1 L.Ed. 2d, page 502):

> "We have considered the remaining questions not passed upon by the Supreme Court of Missouri, and find them to be unsubstantial. Accordingly, we remand the case for proceedings not inconsistent with this opinion."

We quote from the *Webb* case (1 L.Ed. 2d, page 507):

> "We have considered the remaining questions, not passed upon by the Court of Appeals, and find them to be unsubstantial. Accordingly, we remand the case for proceedings in conformity with this opinion."

In the *Ferguson* case, no discussion of other points was contained in the opinion.

However, in another case decided the same day, *Pennsylvania R. Co. vs. Rychlik*, the concluding sentence (1 L.Ed. 2d, page 490) is as follows:

> "The decision below must therefore be reversed and the case remanded to the District Court with instructions to dismiss the complaint."

Deen's position is unsound, unless the mandate and decision in this case means the same thing that it did in the *Rogers*, *Webb*, and *Rychlik* cases. If that is true, two equals nine, and cows are pigs.

Deen, in his two briefs (petition for mandamus and petition for certiorari) is careful not to state positively that the question of "overwhelming weight and preponderance of the evidence" was presented by him in his petition for certiorari on the original appeal in this cause. The petition originally presented in this cause, and resulting in the remanding of this case to the Court of Civil Appeals at Eastland, shows that that issue was not presented by Deen to this Court on the prior appeal, except to the extent that he asked the Court not only to reverse the Court of Civil Appeals but also to affirm the judgment of the trial court. As the Texas Supreme Court not unreasonably points out, since the Supreme Court of the United States did not order the judgment of the trial court affirmed, any such contention by Deen was either not passed on or overruled by the Supreme Court of the United States. If it was overruled, then the petition for mandamus is a motion for rehearing. If it was not passed on, the Texas courts were free to decide it.

For example, we quote from the case of *Hartford Life Insurance Company vs. Blincoe*, 255 U.S. 129, 65 L.Ed. 549, 41 S.Ct. 276, quoting from 65 L.Ed., page 552:

". . . The most that can be said of any question that was decided is that it became the law of the case, and, as such, binding on the supreme court of the state, and to what extent binding is explained in Messenger v. Anderson, 225 U.S. 436, 56 L.ed. 1152, 32 Sup. Ct. Rep. 739. *Certainly omissions do not constitute a part of a decision and become the law of the case, nor does a contention of counsel not responded to.* (Italics ours.)

* * * * *

"It was urged, it is true, in the brief of counsel, that the assessment 'was void because it included money for taxes erroneously claimed to be enacted [exacted] under the laws of Missouri.' No notice, however, was taken of the contention and no influence given to it or to the effect it asserted. *If it made any impression at all, it was obviously as a state question, dependent upon the state statutes, upon which we would naturally not anticipate the state courts, the case necessarily going back to them.*" (Italics ours.)

Additional authorities are:

Chas. Wolff Packing Co. vs. Court of Industrial Relations of Kansas, 267 U.S. 552, 69 L.Ed. 785, 45 S.Ct. 441;

Mutual Life Ins. Co. vs. Hill, 193 U.S. 551, 48 L.Ed. 788, 24 S.Ct. 538.

On page 15 of Deen's petition for mandamus he cites the case of *Ex Parte Texas*, 315 U.S. 8, 86 L.Ed. 579, 62 S.Ct. 418. We agree with him that the case is in point here, because in that case the Supreme Court of the United States had granted certiorari to

the Texas court and had reversed and remanded under a mandate not substantially different from that in the Deen case. See *Lone Star Gas Co. vs. Texas*, 304 U.S. 224, 58 S.Ct. 883, 82 L.Ed. 1304. We probably should add that there, as here, the case was remanded to the Court of Civil Appeals, and subsequently the Court of Civil Appeals of Texas wrote another opinion, and the Supreme Court of Texas granted a writ and wrote another opinion (see 153 S.W. 2d 681). The Supreme Court of Texas opinion indicated that it construed the opinion of the Supreme Court of the United States as passing upon the sufficiency of the evidence to support the verdict (see 86 L.Ed., p. 585), and it therefore remanded the case to the trial court, indicating that the trial court could not reopen the question because it was foreclosed by the Supreme Court of the United States. There, as here, a petition for mandamus was filed against the Supreme Court of Texas, and in its opinion on the mandamus (being the one which Deen has cited in his brief) the Supreme Court of the United States first specifically negatived any intent that its opinion should be construed as foreclosing the relitigation of the issue, subject to the rules of law contained in its opinion, and then refused to issue a mandamus because, in spite of the misconstruction by the Texas court, no ground for mandamus was shown. We quote from that opinion (86 L.Ed., p. 586):

> "In their return, the Chief Justice and Associate Justices of the Supreme Court of Texas state that that Court 'would have rendered the same judgment if it had based the same solely

upon its construction of the State statute and not at all upon its construction of the opinion of this Court.' The return further showed that in remanding the cause to the District Court for a new trial the Supreme Court of Texas acted entirely pursuant to state law: '*The Court of Civil Appeals in this State has full power to set aside findings based on conflicting evidence and believed by it to be against the overwhelming weight and preponderance of the evidence and to remand the case for another trial;* but it is without power to set aside findings based on conflicting evidence and then make its own findings and render judgment thereon.'

"We read this return as a disclaimer by the judges of the Supreme Court of Texas of the construction placed upon their opinion by the petitioners in so far as it touches the scope of this Court's ruling in 304 US 224, 82 L ed 1304, 58 S Ct 883, and the effect of that decision upon the future course of this litigation. Specifically, we read the return as a disavowal by the Supreme Court of Texas that its action in reversing the Texas Court of Civil Appeals and ordering a new trial implied that our decision adjudicated the claim of confiscation or in any wise forecloses trial of that issue. Therefore, when the litigation goes back to the District Court, it will not be imprisoned within an adjudiciation to be attributed to this Court which this Court never made. *We must accept* the return of the Texas judges regarding the scope of judicial review of orders of the Texas Railroad Commission, as well as *their showing regarding the distribution of judicial power within the Texas judicial system. These are matters of local law.*" (Italics ours.)

Unless there is something which Deen's attorneys have found in the above case which does not appear in any of the opinions, it would seem obvious that the Supreme Court of the United States in *Ex Parte Texas*, upheld the practice of reversing and remanding by the Court of Civil Appeals because the verdict is against the overwhelming weight and preponderance of the evidence, and refused mandamus on that very ground. It would seem that, in *Ex Parte Texas*, the very point was decided against Deen.

Therefore, the issue of overwhelming weight and preponderance of the evidence was not passed on by the Supreme Court of the United States because:

(a) It was not presented by Deen;

(b) The Supreme Court of the United States never passes on "weight and preponderance of the evidence";

(c) The Supreme Court did not expressly pass on "the overwhelming weight and preponderance of the evidence", and since, had it passed thereon, it would have ordered the trial court's judgment affirmed, its remand to the Court of Civil Appeals without such instruction either left the question completely unpassed on or constituted an affirmative recognition that it was a matter that the Supreme Court of the United States did not have jurisdiction of.

Before passing to the next argument, we want to note Deen's statement (for example, see petition for mandamus, p. 15) that *if* the Court of Civil Appeals should remand the case for a new trial, the trial court would be required to instruct a verdict in favor of

the railway company under the decisions of the Texas courts. He cites no authority for that proposition, and, of course, the exact opposite is correct. The same thing would happen that happened in the *Lone Star Gas* case which we have referred to above, that is, the second trial would be a trial de novo except that the decision of the United States Supreme Court would be followed and all points decided by it.

> *Wichita Falls Traction Co. vs. Cook*, (S.Ct. Tex.) 60 S.W. 2d 764;
>
> *Sanders vs. Harder*, (S.Ct. Tex.) 227 S.W. 2d 206.

Deen's position, variously taken, that irrespective of what the law may be in other cases that this is an F.E.L.A. case and therefore different rules apply to it, requires some additional statements by this respondent.

For example, on page 11 of the petition for mandamus, Deen says:

> "While Deen has never conceded that the Texas appellate courts, *under federal procedure applicable to FELA, had authority, etc.*" (Italics ours.)

See, also, the petition for certiorari filed in this same cause, pages 9, 15, 18, 22 and 26, where the distinction between an F.E.L.A. case and other civil litigation is either mentioned or inferred.

Deen's position is that a plaintiff under the Federal Employers' Liability Act. (28 U.S.C.A., Sec. 56) is given the option of filing suit in either the state court

or the federal court. With that statement, of course, we agree. With his next contention, though, that when the plaintiff elects to file a case in the state court he is not bound by state rules of practice but by "federal procedure applicable to F.E.L.A.", we violently disagree. This Court has held to the contrary many times. As Mr. Justice Holmes said (*Dickinson vs. Stiles*, 246 U.S. 631, 62 L.Ed. 908, 38 S.Ct. 415) of F.E.L.A. actions in the state court:

> "It contemplated suits in state courts and accepted state procedure in advance. Minneapolis & St. L. R. Co. v. Bombolis, 241 U.S. 211, 60 L. ed. 961, L.R.A. 1917A, 86, 36 Sup. Ct. Rep. 595, Ann. Cas. 1916E, 505; Louisville & N. R. Co. v. Stewart, 241 U. S. 261, 60 L. ed. 989, 36 Sup. Ct. Rep. 586. We see no reason why it should be supposed to have excluded ordinary incidents of state procedure."

See also:

Second Employers' Liability Cases, 223 U.S. 1, 56 L.Ed. 327, ... S.Ct. ..... ;

L. & N. vs. Holloway, 246 U.S. 525, 62 L.Ed. 867, 38 S.Ct. 379;

L. & N. vs. Stewart, 241 U.S. 261, 60 L.Ed. 989, 36 S.Ct. 586;

C. & N.W. R. Co. vs. Gray, 237 U.S. 399, 59 L.Ed. 1018, 35 S.Ct. 620.

Any contrary rule means that, where a litigant is given the choice of bringing his suit in a state court or in a federal court, he is not bound by the rules of procedure of such court. The reverse, of course, is the

universal holding (21 *C.J.S.*, Sec. 527, p. 807, and *State of Missouri vs. Taylor*, 266 U.S. 200, 69 L.Ed. 247, 45 S.Ct. 47).

The Supreme Court of the United States would never hold constitutional an amendment by Congress to the Federal Employers' Liability Act which provided: "In all actions in the state court, under the Federal Employers' Liability Act, the Federal Rules of Civil Procedure shall govern." If Congress cannot do it, certainly the Supreme Court, which has no legislative powers or function, will not do so.

It is the purpose of the Constitution of the United States to protect and preserve the states and their independence and their judiciary, and it is the duty and obligation of the Supreme Court of the United States to protect the state, its government, and its courts.

In the words of Mr. Justice Stone in *Shamrock Oil & Gas Corp. vs. Sheets*, 313 U.S. 100, 85 L.Ed. 1214, 61 S.Ct. 868 (quoting from 85 L.E., p. 1219):

> "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' Healy v. Ratta, 292 US 263, 270, 78 L.ed. 1248, 1253, 54 S Ct. 700; see Kline v. Burke Constr. Co. 260 US 226, 233, 234, 67

L ed 226, 231, 232, 43 S Ct 79, 24 ALR 1077; Matthews v. Rodgers, 284 US 521, 525, 76 L ed 447, 451, 52 S Ct 217; cf. Elgin v. Marshall, 106 US 578, 27 L ed 249, 1 S Ct 484."

It should be noted that there was no dissent from Justice Stone's decision and that the above case dealt with procedure in a Texas court. Confining ourselves to cases dealing with Texas and announcing the same principle, we would refer the Court to *Schwartz vs. Texas*, 344 U.S. 199, 97 L.Ed. 231, 73 S.Ct. 232, and the celebrated case of *Texas vs. White*, 74 U.S. (7 Wall) 700, 19 L.Ed. 227

If a plaintiff in an F.E.L.A. case who elects to file his case in a state court is not to have his case tried under state rules of practice and procedure, what rules do the courts try them under? None? Under the Federal Rules of Civil Procedure? No one is foolish enough to think the United States Supreme Court is going to write a "Federal Rules of Procedure for F.E.L.A. Cases" or that it intends to do so. The only answer is that state procedure applies.

Deen cites no cases to the contrary. He cites a long list of cases on page 12 of the petition for certiorari, of which *Rogers vs. Missouri Pacific R. Co.* (supra) is typical. In each of those cases the Supreme Court of the United States overruled the holding of a lower court that there was "*no evidence*", and that judgment had to be rendered in favor of the defendant. That is exactly what this Court held in the Deen case on the first appeal. That is a law question. In none of those cases did this Court pass on "overwhelming

weight and preponderance of the evidence". Now, it has been said, by members of the Supreme Court of the United States in dissenting opinions, that in the cases listed the Supreme Court of the United States has required less evidence to raise a jury issue in F.E.L.A. cases than in other cases. It may be that the Supreme Court of Texas, respondent's attorney, and many of the circuit courts agree. However, no court and no attorney would deny that the passing upon the issue of "no evidence" is a question of law as to which the Supreme Court of the United States has jurisdiction, and that it is and should be the final judge of "some evidence" versus "no evidence" in all cases in which it has jurisdiction. Those authorities, therefore, are not contrary to the ones we have heretofore cited and quoted from, saying that trials in the state court under the Federal Employers' Liability Act shall be in accordance with state practice. The statement by this Court in such cases that local rules of practice cannot be enforced where they will *deny* the plaintiff a federal right must be read in the context of the opinions as applying to a rule which denies a recovery and not as to a rule of practice. No evidence is a question of law, and a decision by a state court that there is "no evidence" under local practice is a decision of law denying the plaintiff a right under a federal statute. That is not a rule of practice or procedure of a state court, which merely requires that the rights of a plaintiff in an F.E.L.A. case be determined by the same rules of practice and procedure that are applicable to all other civil litigants. We say those cases are not in point, and we further say that

in none of those cases did the Supreme Court of the United States pass on "the overwhelming weight and preponderance of the evidence". Nor in any of those cases did the Supreme Court of the United States hold that an F.E.L.A. plaintiff was not bound by state rules of practice.

The only case which plaintiff cites remotely indicating that a state rule of practice is not applicable in an F.E.L.A. case is *Arnold vs. Panhandle & Santa Fe Ry. Co.*, 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed. 2d 889. That is a Per Curiam opinion, without any thorough discussion of this point, and frankly we cannot understand what the Court held. If Deen's theory is correct, then the Supreme Court of the United States certified as being a fair and just rule for trials of all types of civil litigation Federal Rule of Civil Procedure 49(b). This rule provided that where a jury returned a verdict containing special findings which conflicted with a general finding, the special findings would control. The Texas court, in the *Arnold* case, applied the same rule to a Texas special verdict. This Court reversed and remanded. To accept Deen's interpretation of the *Arnold* case would mean that the Supreme Court of the United States says Rule 49(b) is fair and just and applicable to all litigation in the federal courts, but that the Supreme Court of the United States says that the same rule applied by a state court in an F.E.L.A. case denies the F.E.L.A. plaintiff a constitutional right. Deen's attorneys believe the Supreme Court of the United States so held. The Santa Fe's attorneys refused to believe that the Court so held.

If Deen's attorneys are correct, then the majority of the Supreme Court of the United States has gone a long way to regulate rules of practice in a state court in F.E.L.A. cases. If Deen's attorneys' interpretation of the decision in the *Arnold* case is correct, then our argument is and must be that there is bound to be some limit and that surely the *Arnold* case represents the limit and the Supreme Court of the United States should not extend such a doctrine by applying it to the Deen case.

May we respectfully suggest that if the object of a trial of an F.E.L.A. case is "equal justice under law", that no rule of practice, state or federal, which applies equally to both plaintiff and defendant is an undue burden on either. Surely there is nothing unconstitutional about a rule of practice designed to give both parties a fair trial. May we further respectfully ask: If the situation had been reversed, and a Texas court had held that a verdict *against* Deen was against the overwhelming weight and preponderance of the evidence and reversed the cause for a new trial, would a federal question arise? Would this Court either mandamus or grant certiorari to review such a holding? These questions need no answer.

It is respectfully submitted that the petition for mandamus should be denied.

CONCLUSION

When all of the rancor is removed from Deen's petition, it is obvious that the worst thing that could happen to him, even if he is right about everything,

is that the case will ultimately be remanded to the District Court of Brown County, Texas, for a new trial before a different jury. If that jury gives him twice as much damages as he received in the first trial, no federal right will have been infringed, Deen will have been denied no federal right and no provision of any constitution will be involved. If that trial results in a verdict for Deen for half what he received in the first trial, and if the Texas Supreme Court or Court of Civil Appeals has, in its opinions prior to the filing of this petition for mandamus, denied Deen any federal right, he can then appeal on the decisions now made. In short, Deen can win, but he cannot lose. Surely such a situation does not justify the issuance of any character of mandamus or certiorari.

Respectfully submitted,

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I certify that a copy of the foregoing respondent's reply to petition for mandamus has been mailed on the 1st day of July, 1958, to the petitioner's attorneys, as follows: to Mr. David C. McCord, 519 Mercantile Bank Building, Dallas 1, Texas; and to Messrs. Johnson, Guthrie & Stanfield, 1608 Mercantile Bank Building, Dallas 1, Texas.

Luther Hudson

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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 133—Miscellaneous

EARL R. DEEN,

Petitioner,

v.

HONORABLE J. E. HICKMAN, Chief Justice and HONORABLE W. ST. JOHN GARWOOD, *et al.*, Associate Justices of The Supreme Court of Texas,

Respondents.

REPLY OF PETITIONER TO RESPONDENT'S REPLY

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August 27, 1958

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To The Honorable the Chief Justice and The Associate Justices of The Supreme Court of The United States:

I. INTRODUCTION

In spite of the forty-six pages of respondent's confused presentation, its misrepresentation of petitioner's positions, its gossip "Without going completely outside the record, we cannot tell the Court why Deen," etc. and its citation of some eighty-eight authorities, most of which have nothing to do with the issues before the Court, it is still true there

are only two simple, direct and clear-cut issues before this Court:

1. Does this Court have jurisdiction to issue a writ of mandamus in this case to The Supreme Court of Texas?

2. Has The Supreme Court of Texas violated the mandate of the Supreme Court of the United States;

II. JURISDICTION

In his Motion for Leave to File Petition for Writ of Mandamus and the accompanying petition, petitioner has referred to the Act of Congress that authorizes the writ and has cited authorities in support thereof. In Respondent's Reply (p. 4) the respondent does not question in general the jurisdiction of this Honorable Court to issue the writ to the highest state court but does question the jurisdiction in the *Deen* case, because

1. no final judgment has been entered;

2. Deen's petition presents no substantial federal question;

3. Deen's petition should be directed to the Court of Civil Appeals of Texas rather than The Supreme Court of Texas; (Reply, p. 16)

4. Mandamus will not lie because Deen either now has or at some future time will have an appropriate and adequate remedy by writ of certiorari. (Reply, p. 4.)

1. With respect to the finality of the judgment of The Supreme Court of Texas, Deen says the Supreme Court of the United States has finally decided that Deen's proofs justified with reason the jury's conclusion that employer

negligence played a part in producing his injury. Petitioner does not care how The Supreme Court of Texas or respondent characterizes the above holding, as a holding of "enough evidence," "some evidence," "more than no evidence," "more than a scintilla of evidence" or whatever terminology they may use, the conclusion is inescapable the Supreme Court of the United States has appraised Deen's evidence as meeting the test for a jury case under FELA. That holding establishes the law of the case and The Supreme Court of Texas, under the guise of local practice, cannot evade the mandate of the Supreme Court of the United States nor prescribe a different test for judicial appraisal of the sufficiency of Deen's evidence to make a jury case.

Under the mandate of the Supreme Court of the United States, The Supreme Court of Texas cannot tamper nor meddle in any way with the evidence question and cannot direct the Court of Civil Appeals to tamper nor meddle with that question. Many other questions were left open for the decision of the state courts, questons relating to the sufficiency of the pleadings, the Court's charge, the excessiveness of the verdict, etc. All those questions have been now finally decided by The Supreme Court of Texas. Since all questions relating to the judicial appraisal of the evidence to meet the test under FELA for a jury case have been finally decided by the Supreme Court of the United States and since thereafter The Supreme Court of Texas has finally decided all other questions left open by the mandate of the Supreme Court of the United States, The

Supreme Court of Texas rendered a final judgment in this cause, whether it knew it or not, and the only question left open for the review of this Honorable Court is whether Deen has been deprived of the right of trial by jury a second time by taking away from him a part of the damages awarded him by the jury on substantial evidence.

But irrespective of the finality of the judgment of The Supreme Court of Texas, Deen is entitled to a writ of mandamus to compel obedience to the mandate of this Court unless at this time he can obtain the same relief by writ of certiorari. Mandamus will lie when a state court has reached the point that no further proceedings may be had without violating the mandate of the Supreme Court of the United States irrespective of whether a final judgment has been rendered. In *Ex Parte Texas*, *315 U. S. 8, 86 L. Ed. 579, 62 S. Ct. 418*, this court clearly recognized its jurisdiction to issue a writ of mandamus to The Supreme Court of Texas in a case where no final judgment had been rendered.

2. Respondent's second point on jurisdiction is that Deen's petition for mandamus will not lie because no substantial federal question is involved. Petitioner cannot agree with respondent that the construction of the mandate of the highest court in the land does not present a substantial federal question. In *Ex Parte Texas*, supra, this Honorable Court, speaking through Mr. Justice Frankfurter, refers to the proper construction of the mandate of this Court as "an indubitably federal question."

3. Respondent's third point on jurisdiction is that, if Deen is entitled to mandamus at all, it should be directed to the Court of Civil Appeals of Texas rather than to The Supreme Court of Texas. But why should the writ be directed to the Court of Civil Appeals of Texas, who has faithfully executed the mandate of the Supreme Court of the United States, rather than to The Supreme Court of Texas who has disobeyed that mandate and has directed the Court of Civil Appeals to violate it by inquiring into a question finally decided by the Supreme Court of the United States? Why should Deen be put to the vexation and expense of participating in further proceedings in various Texas courts in violation of the mandate of this Honorable Court on a question that has already been finally decided in his favor by this Court?

4. Respondent's final point on jurisdiction is that a writ of mandamus will not lie if Deen now has or will hereafter have some other adequate remedy. There is no issue between the parties that a writ of mandamus is a drastic remedy and will not lie if there is other adequate remedy. Petitioner's position on this point is made clear by his seeking a writ of mandamus in the alternative and only in the event the Court should decide that a writ of certiorari will not lie. If at the present time, a writ of certiorari will lie, Deen is not entitled to have issued a writ of mandamus. Deen does not agree with respondent that a writ of mandamus will not lie if at any time in the future Deen will have his remedy by writ of certiorari. The alternate remedy must be adequate. Respondent says even if The

Texas Supreme Court has directed the parties to litigate further contrary to the mandate of the Supreme Court of the United States and to litigate further a question that has already been decided in Deen's favor by the Supreme Court of the United States, which contentions respondent concedes only for the sake of argument, nevertheless, Deen will have an adequate remedy by certiorari at some distant time in the future when a final judgment is rendered, and therefore a writ of mandamus will not lie at this time. But the hope of a remedy is not an adequate remedy. What assurance does Deen have that an appellate court that reverses and remands his cause of action in violation of the mandate of this court and refuses to comply with the mandate of this court by issuing execution for costs, would ever render a judgment final in form in his cause? If the jurisdiction of the Supreme Court of the United States to enforce its mandate by mandamus depends on The Supreme Court of Texas' rendering a judgment final in form after remand, then the mandate can never be enforced unless The Supreme Court of Texas permits its enforcement. Nor does petitioner concede that even if he might be entitled to a writ of certiorari after the vexation and expense of four or five more years of litigation, that this is an adequate remedy which prevents the issuance of a writ of mandamus at this time. This very point was decided by the Supreme Court of the United States in issuing a writ of mandamus in

Gaines v. Caldwell, 148 U. S. 228, 13 S. Ct. 611, 617.

"In the present case, as we have before observed, there was no discretion to be exercised by the circuit

court; and although it might have been admissible to raise the question by a new appeal to the proper court, yet, in view of the delay to be caused thereby, we do not consider that such remedy would have been, or would be, fully adequate, or that a writ of mandamus is now improper."

III. HAS THE SUPREME COURT OF TEXAS VIOLATED THE MANDATE OF THE SUPREME COURT OF THE UNITED STATES?

Apart from the jurisdiction question, the only issue remaining as petitioner stated in his petition for mandamus on page 10 is:

> "Whether The Supreme Court of Texas has violated the mandate of the Supreme Court of the United States in directing the Court of Civil Appeals of Texas to inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury when the Court of Civil Appeals was informed by the mandate of the Supreme Court of the United States that 'We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury,' and the Supreme Court of the United States directed the Court of Civil Appeals to proceed 'in conformity with the judgment and decree of this Court above stated * * *'."

How does respondent meet this issue? It has no reply thereto. So it resorts to evasion, confusion and the tactics of attributing to petitioner positions that petitioner does not take at all.

1. Respondent says The Supreme Court of Texas did not do at all what petitioner charges it with doing in the above

issue. (Reply, p. 20.) What The Supreme Court of Texas has done is indefensible and petitioner does not blame respondent for running away from the issue. However, respondent cannot change what The Supreme Court of Texas has said and done. Here are the exact words of The Supreme Court of Texas:

> "Consistently with our decisions cited in footnote 4, supra, we might ourselves now remand the case to the trial court for a new trial, but considering the peculiar circumstances of this case, and in the hope of making somewhat clearer the basic issue decided, we shall remand the case to the Court of Civil Appeals with directions to the latter to adjudicate, upon its own independent evaluation of the evidence and wholly apart from the judgment of the Supreme Court of the United States, whether or not the jury finding of negligence of the defendant in failing to furnish proper tools is so against the weight and preponderance of the evidence as to require a new trial in the interest of justice, and upon the basis of its said adjudication, to either affirm the judgment of the trial court or grant a new trial." (Opinion of Court as copied in Appendix of Petition for Writ of Mandamus, pp. 38-39.)

In the above issue, petitioner has correctly represented what The Supreme Court of Texas has done.

2. On page 18 of its Reply respondent resorts to its confusion argument. Respondent says that Deen contends that Mandamus will lie because this is an FELA case and there is an automatic exception in his favor to all provisions of the Constitution, the statutes, rules of court, and decisions and that Deen construes the comments of Justices Jackson, Roberts and Frankfurter in dissenting opinions,

as well as others, as evidencing an intention by the majority of the Supreme Court of creating a preferred class of litigants. Deen has made none of these contentions. But if he had, it would not justify The Supreme Court of Texas' violating the mandate of the Supreme Court of the United States. If the railway company wishes to make any charges against the Supreme Court of the United States or wishes to emphasize opinions expressed in some dissenting opinions, why does it not do so straight and direct rather than trying to force Deen to present its views?

3. Beginning on page 21 of its Reply and continuing to page 37 respondent says that The Supreme Court of Texas did not violate the mandate of the Supreme Court of the United States by directing the Court of Civil Appeals to inquire into the sufficiency of the evidence to support the jury verdict because the Supreme Court of the United States only decided that there was some evidence to support the jury verdict and this left open for determination by the state courts the question whether the verdict of the jury was against the overwhelming weight and preponderance of the evidence. Respondent argues at great length and cites many authorities on the points, that questions not passed on by the Supreme Court of the United States on certiorari are left open on remand for the determination of the state courts, that only questions expressly or by necessary implication passed on by the Supreme Court of the United States are encompassed within its mandate and that the Supreme Court of the United States does not pass on questions of fact. Deen does not contest any of these state-

ments. They again illustrate the point, respondent has no answer to the issue before this court presented in the petition for mandamus and respondent must try to find issues on which it can take a stand. The Supreme Court of the United States said in its mandate:

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury."

That means that Deen's proofs have met the test of a jury case under the Federal Employers Liability Act. That means the Supreme Court of the United States has judicially appraised Deen's evidence as supporting with reason the jury's conclusion that employer negligence played a part in producing Deen's injury. That means that judicial appraisal of the evidence has been finally determined. That means so far as the evidence is concerned, Deen has met the burden placed on him by FELA and the obligation of his employer to pay damages has arisen. *Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 77 S. Ct. 443.* Irrespective of any words, respondent may use to describe the above holding of the Supreme Court of the United States its meaning is clear. There have been many attempts to circumvent the test of a jury case in FELA cases as established in numerous cases by the Supreme Court of the United States. It has even been attempted by seeking to make the very distinction that The Supreme Court of Texas and respondent are seeking to make in this case, that is, that the Supreme Court of the United States in FELA cases can only pass on questions of no evidence and

the sufficiency of the evidence is for the state courts. But the Supreme Court of the United States refused to make any such distinction in

Harsh v. Illinois Terminal R.R. Co., 348 U. S. 940, 75 S. Ct. 362, 99 L. Ed. 736.

The Court of Appeals of Illinois in the above case held the verdict of the jury was against the weight and preponderance of the evidence and reversed and remanded the cause for a new trial. The Supreme Court of the United States granted certiorari and reversed the case simply citing

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740.

What the Supreme Court decided is clear when the following words of the *Lavender* case are considered:

> "We hold, however, that there was sufficient evidence of negligence on the part of both the Frisco trustee, and the Illinois Central to justify the submission of the case to the jury and to require appellate courts to abide by the verdict rendered by the jury." *(66 S. Ct. 740 at 743.)*

4. Respondent's final position as stated on page 38, et seq. of the Reply appears to be that since under local practice generally the Court of Civil Appeals of Texas may reverse and remand a case for new trial because in its opinion the verdict of the jury is against the overwhelming weight and preponderance of the evidence that it still has the right irrespective of the fact that the Supreme Court of the United States tells it in its mandate:

> "We hold the proofs justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury."

The Court of Civil Appeals of Texas correctly held to the contrary. The Supreme Court of Texas reversed the Court of Civil Appeals on this point alone. After a mandate has been issued by the Supreme Court of the United States, state courts cannot proceed just as they did before the mandate and as if nothing had been settled by the Supreme Court of the United States. After remand, a lower court does not even have the power to grant a new trial on newly discovered evidence on a point decided by the Supreme Court of the United States.

Ex Parte Dubuque & Pac. R. Co., 1 Wall. 69.

While respondent has cited numerous cases discussing distinctions between "no evidence," "sufficient evidence," etc. not one of these cases hold or even suggest that a state court can again inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury after the Supreme Court of the United States has already decided this question.

The Supreme Court of the United States has numerous times said it will not permit federal employers under FELA to be deprived of substantive federal rights under the guise of local practice. Certainly the right of trial by jury given federal employers under FELA and the corollary question whether the evidence is sufficient to make a jury case involve substantive rights, present federal questions, and such rights are not to be denied by state courts under the

guise of local practice, even in the absence of any specific mandate from the Supreme Court of the United States.

Brady v. Southern R. Co. (1942), 320 U. S. 476, 64 S. Ct. 232;

Chicago M. & St. P. Ry. Co. v. Coogan (1926), 271 U. S. 472, 46 St. C. 564;

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740;

Harsh v. Illinois Terminal R. R. Co., 348 U. S. 940, 75 S. Ct. 362, 99 L. Ed. 736.

As The Supreme Court of Texas said in discussing the *Deen* case in

Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, 226:

> "In an action under the Federal Employers Liability Act, the question of what constitutes negligence, and the sufficiency of the evidence to raise that question for the jury, is to be determined by the applicable federal decisions."

IV. FURTHER COMMENTS ON RESPONDENT'S REPLY

1. Respondent on page 3 of its Reply says it owes the costs in the Supreme Court of the United States and will pay them subject to any offsets it may hereafter have. Deen prefers that the Santa Fe pay its debt now and in accordance with the mandate of the Supreme Court of the United States.

2. On page 4 respondent says the questions at issue in the petition for mandamus are:

> a. Whether the fact that this is an FELA case creates an exception to the uniform rule that the Supreme Court of the United States will never issue a mandamus where petitioner has the right of review by certiorari or appeal;
>
> b. Whether the mandate of the United States Supreme Court should have been construed by the Texas courts as a mandate ordering the affirmance of the trial court's judgment, without the right to consider matters not disposed of by the United States Supreme Court.

Petitioner agrees with respondent the fact that this is an FELA case does not create any exception to the general rules applicable to the issuance of the writ of mandamus by this Court to a lower court, but does not agree that a writ of certiorari that may be issued some time in the future necessarily an adequate remedy.

Petitioner agrees with respondent that the mandate of the Supreme Court of the United States should not have been construed by the Texas courts as a mandate ordering the affirmance of the trial court's judgment, without the right to consider matters not disposed of by the United States Supreme Court, and was not so construed.

3. On pages 5 to 11 respondent discusses the question and cites authorities on the point whether the granting of a new trial on the ground that the jury's verdict is against the weight and preponderance of the evidence is a denial of the right of trial by jury. The issue between the parties on the petition for writ of mandamus is whether The Supreme

Court of Texas has violated the mandate of the Supreme Court of the United States in directing the Court of Civil Appeals, irrespective of that mandate, to inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury when the Court of Civil Appeals was informed by the mandate of the Supreme Court of the United States:

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury."

4. Irrespective of what the Supreme Court of the United States may have said about the legal meaning of such expressions as "contrary to the evidence," "against the weight of the evidence" and "insufficient evidence" in construing an act of the Congress applicable to the District of Columbia in

> *Metropolitan R. R. Co. v. Moore*, 121 U. S. 558, 30 L. Ed. 1022, 7 S. Ct. 1334,

quoted at great length on pages 22-25 of respondent's Reply, The Supreme Court of Texas should not have violated the mandate of the Supreme Court of the United States by directing the Court of Civil Appeals to inquire into a question that the Supreme Court of the United States had already decided.

5. Deen is not using a petition for mandamus as a motion for rehearing as stated by respondent on page 28 of its Reply. Why should Deen want a rehearing since all ques-

tions have now been decided in his favor either by the Supreme Court of the United States or The Supreme Court of Texas? Deen has already indicated by filing a remittitur that he is willing to forego $5500.00 of the damages awarded him by the jury on substantial and uncontradicted evidence, and taken away from him by the Court of Civil Appeals of Texas and The Texas Supreme Court, rather than be subjected to any further proceedings in the Texas courts. He does not want any rehearing. However, Deen believes this Honorable Court, at the proper time, will uphold the jury verdict in his favor on damages as it has heretofore done on negligence and causation.

6. Respondent cites *Ex Parte Texas*, *315 U. S. 8, 86 L. Ed. 579, 62 S. Ct. 418 (Reply 34-37)* as deciding, contrary to Deen's contention, "the very point" presented by Deen in his petition for writ of mandamus. In *Ex Parte Texas* in its opinion the Supreme Court of the United States expressly says that it did not pass on the sufficiency of the evidence to support the jury verdict and that on remand this question was left open for the determination of the state courts. Mr. Justice Frankfurter, speaking for the Court, said:

> "Therefore, when the litigation goes back to the District Court, it will not be imprisoned within an adjudication to be attributed to this Court which this Court never made."

In the *Deen* case, petitioner is asking that the litigation be imprisoned within an adjudication which the Supreme Court of the United States did make.

7. Deen at no time has contended that if the case is remanded to the trial court that the trial court would be required to instruct a verdict in favor of the railroad company (Respondent's Reply, pp. 37-38). Deen said that under Texas practice, the trial court on a new trial would have to submit the case to the jury, even if respondent's construction of the mandate is correct, which petitioner denies. However, if the jury again found for Deen the trial court in compliance with the decisions of The Texas Supreme Court and the Court of Civil Appeals would have to set the verdict aside because of the insufficiency of the evidence, if Deen presented the same evidence again. In discussing this strange anomaly in Texas practice the Court of Civil Appeals of Texas at Beaumont in

Norvell Service Company v. Spell, et al., 288 S. W. 2d 133, 144,

says:

> "Under the rule of decision referred to, a trial court must submit an issue to the jury even though the Court of Civil Appeals would have to set aside the finding which was based on the evidence requiring the submission."

The Supreme Court of Texas refused writ of error in the above case on the ground that the Court of Civil Appeals had committed no reversible error. Stripped of all legal jargon, the above rule means that a party is entitled to a jury trial so long as the jury decides the case the way the Texas appellate courts wish or think the case should go.

Even though the Court of Civil Appeals at Beaumont felt constrained to follow the above rule, in doing so the Court said:

> "It is a peculiar rule."

8. In his petition for writ of mandamus Deen did not take the position nor state that under the FELA a party is given the option of filing suit either in the state court or the federal court. (Respondent's Reply, pp. 38-39.) If it will help respondent present his argument, Deen is willing to take such position at this time. Nor has Deen contended as charged on page 39 of Respondent's Reply that state rules of practice cannot be followed in FELA cases. Deen's position is that The Supreme Court of Texas cannot deprive him of the substantive right of trial by jury, given him by the Congress, under the guise of local practice, particularly when the application of the local practice rule violates the mandate of the Supreme Court of the United States. Repondent knows the correct rule with regard to local practice as evidenced by the following words on page 23 of its Reply to Deen's Petition for Certiorari:

> "This Court has never overruled Dickinson v. Stiles, although it has held that some particular rule of practice destroyed the rights of a plaintiff under the Federal Employers Liability Act, and hence was unenforceable."

One of these unenforceable rules of local practice that the Supreme Court of the United States will not permit to destroy the rights of a plaintiff under FELA is that which prescribes the kind or amount of evidence re-

quired to establish jury issues on negligence and causation.

Chicago M. & St. P. Ry. Co. v. Coogan (1926), 271 U. S. 472, 46 Sp. Ct. 564, 565;

***Brady** v. Southern R. Co. (1943), 320 U. S. 476, 64 S. Ct. 232.*

The Supreme Court of Texas, whose actions the respondent is defending, in discussing the *Deen* case in

Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, 226

stated the rule in these words:

> "In an action under the Federal Employers Liability Act, the question of what constitutes negligence and the sufficiency of the evidence to raise that question for the jury, is to be determined by the applicable federal decisions."

9. On page 22 of his Petition for Writ of Certiorari, Deen made the following statement:

> "The Supreme Court of the United States is the final authority to interpret the effect of a jury verdict rendered in a Texas state court in a FELA case. [Arnold v. Panhandle and Santa Fe Railroad Co. (1957), 353 U. S. 360, 77 S. Ct. 840.]"

The above is all that Dean said about the *Arnold* case either in this petition for mandamus or in his petition for writ of certiorari. Deen respectfully asks the Court to compare what he actually said about the above case, as noted above, and what the Santa Fe says that he said, on pages 43 and 44 of Respondent's Reply. Again petitioner says that if respondent wishes to criticize the opinion

of the Court in that case or express its approval of the minority opinion, it should do so straight and direct rather than doing so indirectly under the guise of attacking positions, which Deen has not assumed.

10. Petitioner does not agree with respondent's statement on page 45 of the Reply that if Deen will just go on back to the trial court for a trial de novo that he can win but he cannot lose. Why should Deen be put to the vexation, delay and expense of a new trial when all questions have been decided in his favor either by the Supreme Court of the United States or by The Supreme Court of Texas. Deen has no desire to be a modern Don Quixote fighting the windmills of legal technicalities and injustices in the Texas courts the rest of his life.

WHEREFORE, petitioner prays as he has heretofore prayed and petitioner prays for general relief.

Respectfully submitted,

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August 27, 1958

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply has been mailed on the 28th day of August, 1958, to the Honorable J. E. Hickman, the Chief Justice, and Honorable W. St. John Garwood, Meade F. Griffin, Robert W. Calvert, Clyde E. Smith, Frank P. Culver, Jr., Ruel C. Walker, James R. Norvell and Joe R. Greenhill, the Associate Justices of The Supreme Court of Texas c/o The Supreme Court of Texas, Capitol Building, Austin, Texas; and also to Messrs. Wigley, McLeod, Mills and Shirley, Attorneys at Law, Union Station Building, Galveston, Texas; to Messrs. Woodruff and Holloway, Attorneys at Law, First National Bank Building, Brownwood, Texas; and to Messrs. Hudson, Keltner and Sarsgard, Attorneys at Law, 1313 Continental Life Building, Fort Worth 2, Texas, attorneys for Gulf, Colorado and Santa Fe Railway Company.

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